United Parcel Service of Ohio *and* Daniel P. Kane. Case 21–CA–27855

May 28, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 22, 1995, Administrative Law Judge Joan Wieder issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United Parcel Service of Ohio, Baldwin Park, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging and refusing to reinstate employees because they exercise their right to engage in concerted protected activities as guaranteed by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Daniel Kane, William Marmolejo, Byron McClendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Daniel Kane, William Marmolejo, Byron McClendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports,

[1] Based on our recent decision in *United Parcel Service*, 318 NLRB No. 97 (Aug. 25, 1995), we find that the Board has jurisdiction over the Respondent and the employees involved in this proceeding. We therefore find it unnecessary to pass or rely on the judge's jurisdictional findings in sec. I of her decision, except to the extent that we find that none of these findings indicate or reflect improper bias on the part of the judge, as contended by the Respondent.

The Respondent also asserts that the judge's credibility resolutions and certain findings of fact pertaining to the merits of the complaint are the result of bias. After a careful examination of the entire record, we are satisfied that the Respondent's assertion is without merit. There is no basis for finding that bias and partiality existed because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949): ''[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.'' Furthermore, it is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

However, we note three inadvertent factual errors made by the judge, which are insufficient to affect our general agreement with the results of her decision, which we have adopted. First, in fn. 11 of her decision, the judge incorrectly stated that Union Business Agent Bill Arnold rather than Union Secretary-Treasurer Carl Lindeman was identified by the Circuit Court of Appeals for the Ninth Circuit as the source of the conflict of interest between the Union and the Charging Party. Second, in the 29th paragraph of the section of her decision entitled ''Analysis and Conclusions,'' the judge incorrectly found that the Respondent failed to follow its established practice in informing stewards about upcoming grievance meetings. The record shows no such practice existed and that the Respondent usually contacted Union Business Agent Arnold who, in turn, notified the grievants and/or the stewards. Finally, in the same paragraph of her decision, the judge characterizes the conversation between Harvey Quinn, the Respondent's district labor relations manager, and Dennard Leister, the Respondent's loss prevention manager, as ''short,'' while the record does not indicate how long they spoke.

In addition, we do not adopt that portion of the judge's decision where she mistakenly referred to certain cases as support for particular propositions that she cited. Thus, in affirming the judge's findings that an adverse inference should be drawn from the Respondent's failure to call Division Manager Mel Smith, District Manager Al Barnes, and ''HR Manager'' Garrett Wilson, we rely on *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988). In affirming the judge's statement that the filing of a grievance is Sec. 7 protected concerted activity, we rely on *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984). Finally, we note that the quoted description of the term ''grievance'' in the fourth paragraph of the ''Analysis and Conclusions'' section of the judge's decision appears in *Dow Chemical Co.*, 227 NLRB 1005 (1977), and not in the case identified by the judge.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at all facilities and places of business, in San Gabriel, California, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 1990.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discipline employees because they exercise their right to engage in concerted protected activities, such as filing grievances or otherwise lawfully petitioning their employer, as guaranteed by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Daniel Kane, William Marmolejo, Byron McClendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Daniel Kane, William Marmolejo, Byron McClendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Daniel Kane, William Marmolejo, Byron McClendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

UNITED PARCEL SERVICE OF OHIO

Yvette Holliday-Curtis, Esq., for the General Counsel.
Michael D. Ryan, Esq. and *Thomas Mackey, Esq. (Gibson, Dunn & Crutcher)*, of Los Angeles, California, for the Respondent.
Daniel P. Kane, In Pro Se, of Fontana, California, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. On October 15, 1991, the National Labor Relations Board dismissed the above-captioned complaint based on its determination that it was appropriate to defer to an arbitration award upholding Respondent's discharge of Daniel Kane and six other employees. Kane appealed the Board's decision. On October 1, 1993, the Court of Appeals for the Ninth Circuit, in an unpublished Order, granted the petition for review, vacated the Board's dismissal Order and remanded the case for ''further proceedings consistent with this decision.'' On April 20, 1994, the Board issued an Order Remanding ''for further proceedings consistent with the Court's unpublished memorandum decision of October 1, 1993.'' In compliance with the Board's Order, this proceeding was assigned to me by Order of the Deputy Chief Administrative Law Judge Earldean V. S. Robbins.

This case was heard on various days in September 1994, based on charges filed against United Parcel Service of Ohio (Respondent or Company) on December 19, 1990,[1] by Daniel P. Kane (Kane or Charging Party). The Regional Director

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] All dates are in 1990 unless otherwise indicated.

for Region 21, on February 1, 1991, issued a complaint against Respondent alleging violations of Section 8(a)(1) and (3) of the Act.

In essence, the complaint alleges Respondent unlawfully discharged seven employees and refuses to reinstate these employees to their former positions of employment because they ''engaged in union or other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection.''

Respondent filed an answer to the complaint denying any wrongdoing. Subsequently, as discussed in detail below, Respondent denied the National Labor Relations Board has jurisdiction over its business. Respondent also argues that only Kane's discharge was remanded by the court. For the reasons stated below, I find Respondent violated Section 8(a)(1) of the Act by discharging the seven employees.

On the entire record in this case, including my observations of the demeanor of the witnesses, and my consideration of the submitted briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent did not raise any issue concerning the Board's jurisdiction when the complaint was served, when it filed its Motion for Summary Judgment, or when the Board granted its motion and dismissed the proceeding. Subsequently, Respondent filed a motion in Case 8–CA–24212, requesting the Board defer to the National Mediation Board on the question of jurisdiction.

Respondent requested the instant proceedings be deferred until there was a resolution of its motion in Case 8–CA–24212. I denied Respondent's motion to defer this proceeding. Respondent filed a special appeal with the Board, which, by Order dated August 30, 1994, the Board denied the appeal and directed me ''upon completion of the hearing and the receipt of briefs . . . prepare and serve on the parties a Decision setting forth the resolution of such credibility issues, findings of fact, conclusions of law and recommendations, including a recommended Order regarding the merits of the complaint.''

Respondent claims it is not subject to the National Labor Relations Act (NLRA), 29 U.S.C. 151 et seq. because it is subject to the jurisdiction of the National Mediation Board [NMB] pursuant to the Railway Labor Act [RLA]. Respondent also claims the Board should let the National Mediation Board make the initial determination of whether it is subject to the NLRA or the Railway Labor Act.

Section 2(2) and (3) of the NLRA exclude from NLRB jurisdiction employers and employees who are subject to the Railway Labor Act. Carriers by air are subject to the jurisdiction of the Railway Labor Act.[2] The Respondent accepted the Board's jurisdiction as the law of the case when it initially admitted jurisdiction; accepted the Board's granting its Motion for Summary Judgment/Dismissal; and the court also accepted jurisdiction in granting Kane's petition. Respondent did not participate in the proceeding before the Court of Appeals for the Ninth Circuit. Respondent has not presented any changed circumstances in this case that demonstrate it is a carrier by air.

The issue of whether Respondent is currently subject to the Board's jurisdiction is pending in *United Parcel Services*, Case 8–CA–24212. In that proceeding, Administrative Law Judge Donald R. Holley recommended the Board defer to the National Mediation Board in determining who has jurisdiction over UPS. Respondent does not aver that it had the same operations in 1990 as it does currently or that the ''trucking exception'' did not apply in 1990. I note Respondent has failed to adduce any evidence in this proceeding demonstrating it met the criteria of the Railway Labor Act in 1990. There was no evidence concerning the percentage of the packages handled by Respondent in 1990 moving exclusively on the ground and what percentage were transported by air. The mere fact UPS of Ohio may engage in some air transportation activities does not a fortiori, make it a air carrier as defined in the Railway Labor Act. *Pan American World Airways v. Carpenters*, 324 F.2d 217 (9th Cir. 1963). By decision dated July 17, 1995, as corrected July 21, 1995, the Board, in *Federal Express Corp*., 317 NLRB 1155 (1995), ''resubmitted the record in [Case 8–CA–24212] to the NMB requesting an advisory opinion as to whether the employees at issue are subject to the jurisdiction under the RLA.''

Respondent has previously submitted to the Board's jurisdiction in this case, the terms of the remand, and there has been no determination by the National Mediation Board (NMB) concerning Respondent's position that the employees in issue are not subject to the Board's jurisdiction, and, there is no claim that any other dispositive determination has been made concerning Respondent being under the jurisdiction of the National Mediation Board.

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[2] The Railway Labor Act, 45 U.S.C. 181, et seq. (1964), provides, as here pertinent:

> First. The term ''carrier'' includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operated any equipment or facilities or performs any service (other than trucking service) [emphasis supplied] in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling or property transported by railroad, and any receiver, trustee or other individual or body, judicial or otherwise, when in the possession of the business of any such ''carrier.''
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> . . . .
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> Fifth. The term ''employee'' as used herein includes every person in their service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: 45 U.S.C. 151 (1964).
>
> All of the provisions of section 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. 45 U.S.C. 181.

The mere fact Respondent has some involvement with or as an air carrier does not require the Board to transfer jurisdiction. See *E. W. Wiggins Airways*, 210 NLRB 996 (1974), wherein the Board noted: ''However, contrary to the Employer's contention, the Board has not always transferred cases where the jurisdictional issue was raised to the NMB for an initial determination of jurisdiction.''[3] Respondent failed to adduce any evidence showing the employees concerns fall within the parameters of the RLA. There was no evidence of the percent of the employees involved in air carrier operations, and there was no establishment of a ''substantial relationship'' between the employees here involved and any air carrier. *Northwest Airlines*, 47 NLRB 498 (1943),[4] affd. 51 NLRB 1012 (1943). Respondent has not interconnected the standards applied by the NMB, such as those advanced in *Florida Express Carrier*, 16 NMB 40 (1989), and *DHL Corp.*, 9 NMB 67 (1981), which requires the operations be ''integrally related'' with the characteristics of its operation.

There is no evidence UPS-Ohio and an air carrier have ''centralized general management, financial management and control; centralized personnel procedures and administration, salary levels, fringe benefits, health benefits, grievance procedures; common use or sharing of top management employees, centralized marketing and advertising; consolidated federal income tax returns; and single paymaster IRS classification.'' Id. Respondent failed to describe in detail how it transports its cargo, when it uses air carriers.

In *Wiggins*, supra, and *Pan American World Airways*, supra, decisions, there were minimum activities and involvements required to find a ''substantial relationship existed warranting deferral to the NMB. In *United Parcel Services*, Case 8–CA–24212, it was found Respondent derived 8 percent of its gross revenues from its air operations. In *Wiggins*, the company derived between 5 to 6 percent of its gross revenues from air operations, and Tri-State Aero derived 10 percent of its gross revenues from air services. These companies were found to be subject to the Board's jurisdiction. Respondent has failed to demonstrate transferring this case to the NMB would serve a valid purpose here. *E. W. Wiggins*, supra. See *Bradley Flying Service*, 131 NLRB 437 (1961); *Tri-State Aero, Inc*., 180 NLRB 60 (1969). See also *Safair Flying Service*,, 207 NLRB 119 (1973); *Golden Nugget Motel*, 235 NLRB 1348 (1978).

Respondent's reliance on the *Pan American World Airways'* case is not persuasive in this proceeding. The situations are clearly distinguishable. Initially, there was no question Pan American World Airways was an air carrier. *Northwest Airlines*, 47 NLRB 498. The issue in that case was whether a bomber modification project conducted by the carrier's employees was so closely integrated with the employer's airline operations as to preclude the NLRB from taking jurisdiction. See also *Trans World Airlines*, 211 NLRB 733 (1974).

In the instant case, there is no showing UPS-Ohio has ever been designated a carrier under the Railway Labor Act and no evidence Respondent's operations here at issue was ''so closely integrated'' with the employer's airline operations as to preclude the NLRB from taking jurisdiction. Also, unlike the *Pan American* case, the Board has not been administratively advised by the NMB that, after studying the record of the proceeding, the NMB was of the opinion it had jurisdiction over the employees involved in that proceeding.

Here, where Respondent has failed to indicate how much, if any, of its gross revenue was attributable in 1990 to air carrier operations, there is no basis on this record to conclude Respondent was a common carrier by air or raise such a substantial question of fact. See *Pan American World Airways v. Carpenters*, supra at 223; *Bradley Flying Service*, supra; *Tri-State Aero, Inc*., supra; *Safair Flying Service*, supra.

Moreover, Respondent has not claimed it is subject to the regulations of the Federal Aeronautics Administration or that its employees are subject to the ''continuing authority'' of airline personnel. See generally, *Dobbs Houses v. NLRB*, 443 F.2d 1066 (6th Cir. 1971), for the finding there is no statutory compulsion because there is a mere claim of jurisdiction under the RLA, for the Board to transfer the case to the NMB.

As recently as 1993, the Board has found, without question, Respondent to be subject to its jurisdiction. *United Parcel Service*, 312 NLRB 596 (1993). The case was heard in July 1991 and there was no questioning of the Board's jurisdiction as of that date, on the contrary, it admitted Board jurisdiction. See further *United Parcel Service*, 301 NLRB 1142 (1991). As noted in *Airborne Express*, 304 NLRB 119 (1991), the burden of proof is on the employer to show changed circumstances require a change of jurisdiction.[5] It appears Respondent has failed to meet its burden of adducing evidence to overcome the presumption of continued Board jurisdiction over the operations of UPS-Ohio. It is the Board's determination, under these circumstances, whether to seek an advisory opinion from the NMB.

Accordingly, I conclude the facts and circumstances present in this case, including the Board's and Court's directives, require I consider the merits of this case.

The employees of Respondent who were discharged were represented by Package and General Utility Drivers, Local 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the

[3] Citing *Air California*, 170 NLRB 18 (1968), see also *Dobbs Houses*, 183 NLRB 535 (1970), enfd. 443 F.2d 1066 (6th Cir. 1971). ''In *Dobbs Houses*, the Sixth Circuit stated, 'Concededly, there is no statutory requirement that this question of jurisdiction be submitted for answer first to the National Mediation Board.'''

[4] The Board held ''we therefore reject the foregoing argument of the Company, which would lead to the result that all activities of a concern are exempt from the provisions of the Act [NLRA] if it [Respondent] operates to any extent, however, incidental, as a carrier by air.'' This language was cited with approval by the Court in *Pan American World Airways*, supra, where the Court quoted, with approval, the language of the District Court. See also *Northwest Airlines v. Jackson*, 185 F.2d 74 (8th Cir. 1950), as follows: ''The Railway Labor Act was intended to apply only to transportation activities and that work which bears more then a tenuous, negligible and remote relationship to the transportation activities. It was not intended to apply to all work, regardless of its connection to transportation, merely because the company carrying on the work included carrier activities within its company functions.''

[5] As noted by Administrative Law Judge Jay R. Pollack, air freight forwarders are not covered by the Railway Labor Act. Respondent admits it meets one of the Board's jurisdictional standards, then the burden shifts to the Respondent ''to show that the operation[s] . . . have changed or that [it] is an air carrier.'' Id.

Union), which the parties admit and I find is a labor organization within the meaning of Section 2(5) of the Act.

Peliminary Matters

Respondent claims the only discharge under consideration is that of Kane, since only Kane appealed the Board's dismissal of the complaint, and the Circuit Court of Appeals for the Ninth Circuit concluded:

> Since the uncontested evidence showed a serious conflict of interest between Kane and his union representative at the arbitration, deferral to the arbitration award would have been inappropriate under the Board's standards.

I find since the court granted Kane's petition for review, vacated the Order of the Board in its entirety, and remanded the case ''for further proceedings consistent with this decision,'' that the entire proceeding is remanded. If the court granted the petition and vacated only that portion of the Board's Order, then I would agree with the Respondent. However, since the court vacated the Board's Order of dismissal dated October 15, 1991, in its entirety by granting Respondent's Motion for Summary Judgment/Dismissal,[6] then the entire complaint must be considered.

The Board, in its April 20, 1994 Order, directed a decision and order be prepared on the merits of the complaint, not a portion of the complaint. The court gave Kane's circumstances as the rationale for its decision, its order did not limit consideration to only that portion of the Board's order concerning Kane. The court did not affirm the Board's order concerning the other alleged discriminatees or in any other manner indicate only a portion of the Board's Order and a portion of the complaint should now be considered.

Unlike its actions concerning my ruling not to defer this proceeding, Respondent did not seek permission to file a special appeal on my determination the first day of trial that the entire complaint was remanded for my consideration. Based on the record, I affirm my finding the remand for further proceeding is a remand for consideration on the merits of the entire complaint.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent, which is engaged in shipping letters and packages, operates a facility at 1100 Baldwin Park Boulevard, Baldwin Park, California (the San Gabriel Hub). Respondent and the Package and General Utility Drivers, Local 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO have had a long-term collective-bargaining relationship. The operative collective-bargaining agreement was in effect from August 1, 1990, through July 31, 1993.

At the time of the discharges, Sort Manager Thomas Gloe,[7] and District Labor Relations Manager Harvey Quinn were admitted supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(2) and 2(13) of the Act. Also uncontested as managers were District Manager Al Barnes, Division Manager Mel Smith,[8] Loss Prevention Manager Dennard Leister, and Loss Prevention Supervisor Edward Saicoe.

This case concerns grievances filed by nine employees relating to what has been referred to as a metal detector[9] installed by Respondent at a guard shack at the pedestrian exit to the San Gabriel Hub. The parties stipulated Respondent, on November 21, discharged Daniel Kane, William Marmolejo, Byron McLendon, Alfonso Lozano, Greg Incleton, Rudy Silva, Nicolas Rivas, Christopher Villa, and Larry Smith. It is uncontroverted Respondent reinstated Incleton and Smith. The allegations in the complaint refer to the seven employees who were not reinstated by Respondent. It is also stipulated the above-named employees were members of a bargaining unit represented by the Union on or before November 21, 1990.

The collective-bargaining agreement provided for dispute resolution through grievance and arbitration. The local sort addendum to the collective-bargaining agreement provides, in part:

> The grievance shall be discussed with the employees immediate supervisor and/or manager within five (5) days of the known occurrence giving rise to the grievance. If the grievance is not resolved at this meeting the grievant must submit a signed grievance through the Local Union to the Employer within fourteen (14) working days from the date of the occurrence.
>
> Each of the parties shall make an earnest attempt to settle all differences, but in the event they fail, an Arbitrator shall be mutually selected for Arbitrations and his decision shall be final, binding and conclusive on both parties.

All the alleged discriminatees worked the twilight shift, which generally ran from 4:30 to 10 p.m. Depending on their jobs, some employees reported a little later than others and the employees left work as soon as their jobs were done for the day. Some twilight-shift employees were released on occasion as early as 9 p.m. and others worked as late as 10:30 to 11 p.m. The twilight-shift employees performed a number of jobs including unloading trucks, sorting packages by size and destination, transporting packages to their various loading areas, loading delivery trucks, cleaning up waste, and correcting addresses.

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[6] Respondent did not raise the issue of jurisdiction at the time it filed its Motion for Summary Judgment/Dismissal and now argues since only Kane appealed the Board's ruling on UPS's motion, this proceeding must be limited to considering the lawfulness of Kane's termination. Respondent also asserts its argument on this point should not be construed as a waiver of its claim it is not subject to the Board's jurisdiction.

[7] Gloe became the sort manager on the twilight shift in July 1990. He previously worked for Respondent at another facility.

[8] Barnes and Smith did not appear and testify. There was no reason advanced for their absences.

[9] Respondent claims the unit installed at all times here pertinent, was not a metal detector, rather it was called a FEAR unit that went off on a random basis according to how one of Respondent's agents set the machine. The nature of this unit will be discussed in detail below. For ease of discussion, the device will be referred to as metal detector, device, or unit.

The Grievance

Kane had been appointed a union-shop steward in May, about 6 months prior to filing the grievances. He understood one of his duties was to enforce the collective-bargaining agreement. I credit Kane's testimony that he did not receive formal training in the duties and obligations of union-shop stewards.[10] He had been employed by Respondent as a hub person beginning in September 1979. He understood the grievance procedure to require first discussing the problem with management, and only if the discussion did not resolve the difficulty did the employee file a grievance with the Union.

Once the grievance was given to the Union, the union business agent would review the grievance and file it with the Respondent. Kane did not know whether the Company and or the Union had a policy concerning the solicitation of grievances. During Lozano's 10-year stint as a shop steward, he recalled one incident where grievances had been solicited and that fact did not result in any discharges or other discipline. Respondent and Arnold did not refute this testimony of Lozano, which is credited based on Lozano's open and candid demeanor.

Respondent had a no-solicitation rule. A copy of the no-solicitation policy was posted on all company bulletin boards. It is not claimed the no-solicitation policy contravened any laws. Basically, the policy prohibited employees from soliciting, promoting support for any cause, during working time, or during the working time of other employees. The policy also prohibited the distribution of any printed material in work areas at any time. Working time did not include mealtime or breaktime. Respondent asserts it also had a policy against soliciting grievances, but this policy was not posted.

In the summer of 1990, Kane recalls being delayed in departing the workplace after clocking out because he and the other employees had to go through a metal detector. According to his corroborated testimony, several employees complained to Kane about these delays departing the facility. Their complaints included the misuse of the metal detector, the waiting in line was tiresome, and some complained about being harassed by the guards. Those complaining included Lozano, Rivas, Marmolejo, McLendon, Villa, Larry Smith, and Greg Incleton.

Kane also experienced problems departing the facility; he testified:

> Q. Can you tell the Court what type of problems you had?
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> A. I had to take off my wedding ring, take out my keys and take all change out, take my belt buckle off, had to lift up a shirt, had to take my boots off once.
>
> Q. And what type of problems did you observe other employees having?
>
> A. Key chains, change, waiting in line to get out of work.

Kane claimed he had to wait in line about 3 days of the 5-day workweek. The length of the delay varied.

Kane asserts he did follow the first step of the grievance procedure by discussing the matter with Mel Smith the day after the boot incident. According to Kane's uncontroverted testimony:

> I talked to Mel Smith the day it happened to me. The boots was last straw to me. So I told Mel Smith that there was a problem with the metal detector. That I'm going to file a grievance over the metal detector. Mel Smith raised up his hands and just laughed and said good luck.

Mel Smith did not appear and testify. Based on Respondent's admission, I find Mel Smith was a supervisor. No reason was advanced for the absence of this high-ranking and important witness. I find an adverse inference should be drawn from Respondent's failure to call Mel Smith. *Property Resources Corp. v. NLRB*, 863 F.2d 964 (D.C. Cir. 1988); *Jordan Marsh Stores Corp*., 317 NLRB 460 (1995). *SDC Investment*, 299 NLRB 779 (1990). Kane also mentioned filing a grievance to Gloe but it is unclear whether Kane explained the nature of his problem to Gloe at that time. Kane was a recently appointed shop steward, and Respondent did not require him or any of the other grievants to abide by its interpretation of the requirements of the first step of the grievance process. Respondent proceeded with the grievance at the second step without any claim of impropriety or other protest. There was no showing Kane understood his actions were not in compliance with the collective-bargaining agreement. In fact, there was no clear showing his conversation with Mel Smith did not meet the contractual requirements for the first step meeting with the manager. Accordingly, I find this argument by Respondent unpersuasive, and it fails to demonstrate improper motive.

The claim Kane and Lozano had improper motives is similarly unpersuasive in the circumstances of this case. The employees admitted complaining about the metal detector to Kane and wanted the problem resolved. It was Kane's duty as steward to assist the employees. There is no evidence Kane and/or Lozano were actively campaigning for union delegate at this time or thought performing their duties as stewards would enhance their chances of election. Following this argument to the absurd, all stewards who aspire to higher office could be held to have improper motives if they performed their duties as stewards.

Assuming Kane and Lozano thought the grievance would enhance their chances of election to the delegate position, this factor, considering the credited evidence of problems at the metal detector, has not been shown to be an improper motive. In fact, Lozano had not even decided to run for delegate in October. Also, it would not explain Respondent's failure to reinstate the other five grievants who were not seeking union position.

Another argument advanced by Respondent is that the time delay between the installation of the unit and the filing of the grievance is another indication of the falsity of the

[10] Kane was credibly corroborated by Lozano. Lozano had been a shop steward for 10 years. Lozano was a shop steward on November 20 and convincingly testified he never received any formal training as a shop steward. Bill Arnold, in contrast, first testified Kane had received formal training and Steward Hadbook then later admitted he was not sure if Kane had attended any formal training sessions or if he received a handbook. Arnold's demeanor did not give the impression he was attempting to give full and honest responses. Accordingly, except where Arnold is credibly corroborated, or his testimony is clearly against his interests, his testimony will not be accepted.

claims. This argument fails to consider Respondent was increasing its staffing at the time of the grievance, which may account for an increase in problems. Also, different guards may have been assigned that operated in a manner that increased the delays. Respondent admittedly did not directly oversee the guards, who were not its employees; it left such supervision to the contractor. Not one representative of this contractor testified concerning its understanding of how the guards were to and did operate. The installation date of the actual metal detector was not adduced at the hearing. Even at the time of the grievance, Respondent did not ask the guards about the validity of the grievants' claims. This failure to investigate does not ratify Respondent's decision to terminate the grievants. If that were the case, companies could use grievances as a means of discharging union activists by the mere device of not investigating the grievance and asserting they held a good-faith belief the claims in the grievance were false.

Arnold had, at some unspecified time prior to the grievances, heard verbal complaints from both employees and management concerning delays occasioned by the metal detector. Arnold related these complaints to Quinn and Gloe. Gloe informed Arnold he would ''forward it [the complaint] to his Division Manager.'' Thus, the complaints in the grievance were not sudden and its timing was not shown to be suspicious. Further, Arnold testified:

> Q. And when you stated the same complaint to Mr. Quinn, what, if anything, did Mr. Quinn say?
>
> A. Mr. Quinn said yes, he understands my concerns about time delay at the guard shack, and my suggestion to him was to get a hand-held metal detector so people would not be delayed there and they could—it's kind of like a wand; that they could want a person and see if there's any metal on them.[11]

Based on this credited evidence, I find Respondent was informed of problems at the metal detector and the spirit of the grievance procedure appears to have been followed by Kane inasmuch as Mel Smith informed him it was his opinion it was futile to attempt to resolve the problem and failed to indicate any willingness on his, Smith's part, to resolve the problem at the first stage.

Kane and the other shop steward on the twilight shift, Lozano also discussed the problems they were experiencing at the metal detector as well as the complaints they received from other employees. According to Lozano, the problems he and others he observed experienced at the metal detector included:

> Well, time. Length of time was number one.[12] It would take time. Because they would be checking these people going through it. Sometimes it would beep and they would send them through it over and over again. And make them go until it wasn't beeping anymore.
>
> I went through it and then I would have to take off my bag[13] to make it stop beeping, or my ring, my belt. And it was taking quite a bit of time sometimes.
>
> Occasionally I saw people taking off their shoes . . . . Lifting their shirts.

In response to the complaints he received from the abovenamed employees, his discussions with Lozano and other employees, and one incident where a guard made Kane take his boots off before he would permit him to exit,[14] Kane drafted a grievance. He fashioned the grievance after his experiences at the metal detector. The grievance read:

> Involuntary Search prior to release from U.P.S. property at Baldwin Park, CA. by use of a metal detector at security check point.[15] UPS authorized a private security company to make [me] take off my wedding ring, shoes with metal eyelets, lift shirts, order[ed] to [open] my bag. The search is after I have punched out at my work area. Which results in unpaid time conducting company business and results in an unauthorized search of employee or the security officer [sic] conducting the search.
>
> There are no posted guidelines in the Baldwin Park or San Gabriel [sic] Hub which state what the company policy is pertaining to the search of the person or property. Also there is no sanction by Local 396 in the current contract pertaining to search of persons or property.
>
> I request that the use of this search by metal detector be stopped [immediately]. In addition, I request that I be paid 15 minutes a week from July, 90 as an average time lost based on the involuntary security checks. I request that all employee's of the site be paid 15 minutes for the time lost due to the involuntary search of person

[11] While I generally have not credited Arnold's testimony, I find this testimony about delays, which has been corroborated by all the grievants except Larry Smith, to be credible. Arnold had retired from his union position and was not representing the Charging Party or any current or former employees. The court found a conflict of interest between Arnold and Kane. Thus, the credible corroboration by Arnold of Kane concerning problems at the metal detector and the natural outgrowth of relating the complaints to Quinn and Gloe warrants my crediting this testimony.

[12] Lozano was not consistent in his testimony concerning the amount of time he was delayed at the metal detector. In general, he stated on average the delay was 3 minutes daily. I find this lack of consistency does not warrant discrediting Lozano's testimony. As a witness, Lozano appeared to be attempting to give a full and accurate account of the events. He testified with an open and honest demeanor. Lozano, like all the witnesses in this case, experienced difficulty in recalling events that occurred almost 4 years prior to their appearances. For this reason, I have relied heavily on the witnesses' demeanors in reaching my credibility resolutions.

[13] It is undisputed Respondent required its employees to open their bags at the exit to the facility prior to the installation of the unit. There was no discussion about whether this practice, alone, delayed employees' departure from work after they clocked out.

[14] Kane testified ''The boots was [sic] the last straw to me. So I told Mel Smith that there was a problem with the metal detector.'' After the guard instructed Kane to remove his boots, he asked the guard to call the loss prevention supervisor or a manager because he wanted to inform them there was problem with the metal detector. Kane waited over 20 minutes and no representative of Respondent appeared. Kane stated:

> I wanted to know what the guidelines, the rules, whatever, how to get out of this metal detector. Plus, I felt that the security officer was not trained on how to use this metal detector because every time there was a change of security guard, it varied how you got out of the guard shack.

[15] The bracketed portions were handwritten additions to the grievance and appear to be grammatical changes.

> and property. I request that a time clock be installed at Security Check Point so that all employee's checking out after passing this point.

The record clearly establishes Lozano and Kane discussed the problems they and others were experiencing with the metal detector. They also had discussions with other employees on this subject. I find the alleged discriminatees were engaging in concerted protected activity in filing the grievance based on this uncontroverted evidence the employees discussed problems with the metal detector among themselves and the stewards consulted each other to file a grievance in furtherance of their contract enforcement obligations.

Kane made copies of this grievance and in addition to Kane, the following employees signed copies: Marmolejo, McLendon, Lozano, Incleton, Silva, Rivas, Villa, and Smith. Kane also testified he had about 31 more signed copies. When Kane distributed the grievances he said ''[i]f the grievance pertained to them they can sign it.'' Kane altered some of the grievances after they were signed and after consulting with some of the signatories because Larry Smith brought to Kane's attention[16] some of them were not married. Thereafter, Kane consulted with a few of the employees, and crossed out ''wedding ring'' from their signed copy of the grievance, where appropriate. In one case, he only crossed out the word ''wedding'' for that employee wore a school ring. Kane did not check with the majority of signatories, so he only submitted to the Union those copies of the grievance when he had consulted with the signatories concerning their marital status. Kane testified he subsequently threw out those signed grievances he did not submit to the Union.

Respondent called Slater, a full-time employee on the twilight shift, who testified he told Kane and other employees he did not believe the incidents listed on the grievance happened to Kane and if others signed it they could be in ''big trouble'' for signing a false grievance. Slater did not testify in an open and honest manner. He appeared to be framing his testimony to please the Respondent. He admittedly was angry with Kane. Accordingly, I credit Kane's denial and conclude Slater never told Kane he and others could get into trouble. I also note, while Slater claims he told between 15 to 20 employees not to sign the grievance, not one was called in corroboration; this failure was unexplained. Also unexplained is whether Slater left the same time as the grievants since he was a full-time employee. Respondent also failed to present a background demonstrating Slater's expertise concerning the grievance process, assuming his testimony was to be given probative weight. Thus, Slater will be credited only when convincingly corroborated or when his testimony is contrary to Respondent's interest.

Slater admitted he had to wait at the metal detector when it beeped and he and/or others had to go through the unit again after removing any metal objects. Slater also admitted usually he was the only one leaving at 3 a.m. and if he got off work early, at most there were two or three employees departing at that time. If he had to wait at the unit, then Respondent's description of the FEAR unit would appear to make it statistically improbable to beep with sufficient frequency to cause Slater delay while he was exiting. These statements against Respondent's interests by one of its witnesses are credited.

While Respondent argues Kane solicited grievances during worktime in work areas, all the witnesses testified they received the grievance copies they executed during breaks outside work areas or prior to the commencement of work. I conclude the record fails to credibly establish Kane solicited the grievances in a manner that violated Respondent's no solicitation rule.

After a union meeting at the union hall on or about October 28, Kane handed the nine grievances to then Union Business Agent Bill Arnold. When asked, Arnold[17] informed Kane there was no need to submit the additional 31 grievances he had employees execute. According to Kane, Arnold said nine grievances were sufficient. Arnold also asked Kane if he solicited the grievances and remarked, ''it is the same grievance.'' Kane responded in the affirmative.

Kane testified consistently and believably about the reasons why and the manner in which he created and circulated the grievance. His testimony on these points were credibly corroborated by the other signatories, including Incleton, who had been reinstated by Respondent and appeared as one of Respondent's witnesses. Accordingly, Kane's testimony on these matters is credited.

[16] Larry Smith went to Kane and asked him to cross out ''wedding ring.'' I note Smith informed Respondent he was shamed into signing the grievance because Kane told him one female employee was made to lift her blouse by the guards at the metal detector, that he had not read the grievance. The fact he knew the grievance contained a reference to a wedding ring and requested Kane to remove the term, belies his claim of being an innocent misled by a lie. Smith also claims Kane told him it was a petition, however, the form Smith signed stated in large bold letters at the top ''GRIEVANCE REPORT.''

I do not credit Larry Smith's testimony based on his demeanor, which did not appear to be open and forthright. Supporting this conclusion are the previously mentioned and other inconsistencies in his testimony. There was no explanation why, after he obviously read at least portions of the grievance to discern the reference to wedding ring, he did read it more carefully and did not ask Kane to give it back to him if he felt it was inaccurate. Further, if the only inaccuracy he mentioned to Kane prior to submission to the Union was the ''wedding ring'' reference, why did he inform Respondent at the grievance meeting and testify he did not experience any problems at the metal detector. Why was Smith the only employee who signed the grievance that claimed he never experienced a problem at the guard shack? Finally, it appeared Smith was tailoring his testimony to support Respondent's trial theories and to retain his job as a current employee of the Company.

[17] As noted above, Arnold was an unreliable witness with poor recall. Arnold testified stewards were not to solicit grievances, but Kane testified he was never told he could not solicit grievances as a steward. Arnold admitted there was nothing in the collective-bargaining agreement or other union policy that bars stewards from soliciting grievances. Arnold's claim he personally instructed Kane to not solicit grievances is not credited. For the previously stated reasons, Arnold was not a credible witness. Further, if Arnold was correct, then why did he accept the grievances from Kane, grievances that were basically the same, that he knew were solicited? Arnold also testified he instructed Kane to have the grievant file the grievance, but did not comment when Kane filed the nine similar grievances with him. Arnold testified the Union talked to all grievants prior to going into the grievance hearing. Not one grievant confirmed that Arnold spoke with them prior to their grievance hearings. On the contrary, all testified they were surprised when instructed to go to the meeting and some had never met Arnold previously. These inconsistencies were unresolved

B. *The Grievance Meetings of November 20*

Arnold timely filed the grievances and contacted the Company two or three times about a meeting. The same afternoon of the nine grievance hearings, November 20, Arnold was informed by Respondent the hearings had been scheduled. Contrary to established practice, none of the grievants were forewarned their grievances would be heard that evening. The grievants reported to work at their usual times and were singly informed by their immediate supervisors to report to the conference room upstairs. The grievance hearings were held individually with each grievant.

Present during the grievances for the Company were Gloe, Mel Smith,[18] and Quinn. Arnold was the Union's representative. Quinn had a prepared list of questions he asked each grievant.[19] After asking his questions, Quinn determined Kane was the only grievant claiming all the events listed on the grievance happened to him. The eight other grievants all admitted one or another of the listed matters, such as removing shoes or rings, did not personally occur to them. However some if not all of these employees informed the Respondent's panel during the meeting they thought it was a general grievance or in the nature of a petition that reflected some of the problems the employees were experiencing at the metal detector.

For example, Silva informed Respondent he thought it was a ''general grievance.'' Villa understood the grievance was addressing the metal detector problem and was not limited to the problems he experienced, and he informed Quinn he did not realize signing the grievance form constituted falsifying a document. Rivas informed the assemblage during the grievance meeting that the employees were concerned about being searched. McLendon testified ''I didn't take it to be that technical. I thought it was, you know a whole group. I didn't think it was meant to be each individual person.''

1. Kane

a. *Kane's grievance meeting*

According to Kane,

> First they asked me, I think it was Harvey Quinn, asked me did I file this grievance. I said, yes. He said, ''Did you have to take off your wedding ring. Did you have to—your shoes with metal eyelids, lift shirts, ordered to open the bag'' and I told him, yes, that all these [sic] happened. I told him, ''there's no guidelines out there or anything like that'' and then he turned around and he said you know, ''it's against company policy to solicit grievances'' and I told him that I didn't know that anything about it and it was news to me and Bill Arnold said that shop stewards don't solicit grievances.

When Quinn informed Kane it was contrary to company policy to solicit grievances, Kane replied ''it was news to me'' that he had never been informed of that policy and had not known it was a violation of company policy. Arnold told Kane shop stewards were not to solicit grievances. Quinn admitted Kane's solicitation of the grievances was a factor in his decision to terminate Kane, as follows:

> JUDGE WIEDER: Did the fact that you considered the possibility that Mr. Kane solicited grievances, was that a consideration in your determination to discharge him?
>
> THE WITNESS: It was a consideration.

Kane specifically indicated to Quinn and Gloe that he experienced all the problems at the metal detector related in the grievance. Contrary to Arnold's testimony, Quinn informed Kane the grievance was the first time he heard there was a problem at the metal detector. In fact Quinn denied any communications with Arnold concerning the metal detector prior to the receipt of the nine grievances. For the reasons given below, Quinn's testimony is not credited. Moreover, even if Quinn's testimony on this point is credited, Kane testified without refutation he informed Mel Smith[20] he was experiencing problems at the metal detector and was informed ''good luck'' in getting the Respondent to rectify the problems.

Respondent's failure to make any attempt to controvert this testimony is unexplained. Having found Kane credible in this testimony, I conclude Kane followed the first step grievance procedure and Respondent's resort to the alleged failure of Kane to follow procedure as a reason for his discharge is indicative of pretext. Respondent's resort to pretext warrants the finding of proscribed motive in these circumstances. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), *Southwest Merchandising Corp. v. NLRB*, 149 LRRM 2257 (D.C. Cir. 1995). Another basis for finding proscribed motive is Quinn's admission Kane's admitted solicitation of the grievance was a reason he was discharged.

The morning after the metal detector grievance meetings, according to Quinn, he met with District Manager Barnes, Garrett Wilson, the ''HR Manager'' and Mel Smith;[21] during

[18] Mel Smith was not present for all the grievance meetings.

[19] Although the list was identified and received into evidence, the reporting service noted Respondent failed to furnish a copy to the reporter, in contravention of the Board's Rules. Why the reporting service did not check with me or the Respondent is unexplained. Telephonic requests for the exhibit were unrecorded. Further, all parties were informed at the commencement of one hearing that if they failed to provide the requisite copies of their exhibits to the reporter, the material will not be considered. I find the lack of this list is not essential to reaching a decision in this case. Quinn and Gloe as well as all the grievants discussed the questions, and the nature of the questions is not in issue.

[20] Although Quinn testified one of the reasons he terminated Kane was the lack of a first step because Kane failed to talk with Gloe or Mel Smith prior to filing the grievance, Respondent's failure to produce Mel Smith, or in the alternative, explain his unavailability, under the circumstances here present, as explained in further detail below, where Quinn in a declaration filed with the Board, engaged in knowledgeable misdirection, leads me to conclude Smith would not have disputed Kane's testimony. Not only does this situation warrant taking an adverse inference, as noted above, but it also is indicative of proscribed motive. Further, even if it were a valid motive for discharging Kane, it was a circumstance that did not apply to the other grievants since Quinn knew Kane wrote and solicited their grievances.

[21] Barnes and Wilson did not testify. As was the case with Mel Smith, their absences were unexplained. Of the four people who had direct input in the determination to terminate the grievants, only Quinn, whom I have found to be not credible, testified. I find under these circumstances, an adverse inference should be drawn from Respondent's failure to call any of these managers. Respondent did not

this meeting Quinn reviewed the grievances and comments of the grievants and principally Quinn determined to terminate all nine grievants because:

> I'm saying here it is peak season—I'm sorry. In peak season, everything is going along fine and all of a sudden we get bombarded with these.[22] It just didn't look right. It looked like something was amiss for obvious reasons. The grievances that were submitted were like in the typing, or duplication of each, and then those that were edited, for example, ring taken out, or whatever the case was, it's odd that some have rings, some don't have rings. And then understanding that they were edited my interpretation is everything else would apply to those grievants, which in the course of those meetings turned out not to be true.
>
> There was never discussion, and I explained this to Al, I said, no one has ever brought this to our attention, there's been no first step to the grievance procedures. There's been no talk with any supervisors, no talk with Tom Gloe, no talk with Mel Smith. And Mel is echoing this in the same meeting. You know, no one's ever brought to my attention these kinds of problems, or problems with the metal detector.
>
> They all were asking for money.[23] They all said, with the exception of two, that they had read the grievances, they knew there was money involved, they knew that there was back pay involved.[24]

At all the grievance meetings, Quinn expressed concern and dismay that the grievances contained requests for money. When Quinn explained the metal detector was installed as a deterrent to theft, Kane replied:

> ''That's fine, but, you know, you're keeping me on—I'm not being paid for a company function.'' I go, ''This is a company function, I shouldn't be stuck here all day to get out of the metal detector'' and he says, ''It's thievery and all.'' So I turn around to him and I said ''I got a question for safety reasons, why aren't we going through the metal detector before we go into work because of guns, knives, disgruntled employees, someone can get hurt.'' He turned around to me and told me that ''If we had to stop you, you'd be late and we would have to pay you.'' and I turned around to him and said ''Well, what's the difference, I'm being held up to go home, I'm already off the clock.''

Quinn gave as another reason for the termination decision the lack of any documentation concerning the claimed delays at the metal detector. Quinn did inform Kane during the meeting he did not believe the wait at the metal detector was 15 minutes a week. In response, Kane said sometimes he did not experience delays and other days he experienced long delays, as much as 15 to 30 minutes. Kane informed Quinn he had kept records for a period of time, and he left the grievance meeting to retrieve his records; he could not locate them. Kane never explained the nature of his recordkeeping to Respondent but did offer to withdraw the grievance and resubmit it after he again prepared the sought documentation concerning the extent of the delays employees were experiencing at the guard shack because of the metal detector. Quinn replied that was not a problem, Respondent accepted the withdrawal of the grievance and noted its acceptance at the bottom of the grievance. Kane worked the remainder of the shift.

After the grievance meetings, Quinn met with Gloe for about 1 hour and discussed the meetings. Gloe remembered:

> With Kane, with Dan, I recall us discussing that there was no first step, that there wasn't a meaningful time where Dan and I sat down and talked about it, that the grievance procedures weren't followed, as—and why, and questions about why it took so long for Dan to write a grievance about the detector, since it had been in place for quite some time.

Gloe could not recall further discussion of any basis for a course of action concerning Kane. There is no claim Respondent asked Kane or any of the grievants why they did not file earlier.

b. *Kane's discharge meeting*

As was the case with all nine grievants, when Kane reported to work the afternoon of November 21, he was instructed to report to the office upstairs. Kane was the witness for many of the nine grievants during their discharges. Kane was the last of the grievants to be terminated. After getting a witness Kane objected to, Gloe informed Kane he was being fired for ''failure to fulfill the obligations and requirements of the job—dishonesty, falsifying a document, coercing employees to file grievances.'' Another explanation given for Kane's termination on the discharge form was the grievance ''solicited monetary wages for Hub employees to be paid, and himself.''

Respondent avers the grievants committed acts of deliberate falsification with the intent of acquiring personal gain. Respondent did not claim the request for wages was contrary to company policy, rather, it argues the claim was based on falsehoods; that Kane had a hidden agenda, an ''improper

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dispute Barnes and/or Wilson were highly placed managers at the facility. *Property Resources Corp. v. NLRB*, supra.

[22] Quinn failed to provide any probative basis for his claim there were no problems concerning the metal detector prior to the filing of these grievances. Even though the grievances were filed around October 23, there is no assertion Respondent investigated the claims of the grievants by observing the employees exiting from the twilight shift. Respondent's failure to do an independent assessment of the claims in the grievance is not explained by its assertion the machine was a FEAR unit and not a metal detector. Quinn was uninformed the unit was not a metal detector until the day before the grievance meetings. Interestingly, Respondent although expressing grave concern over the allegations in the grievance the guards were requiring employees to remove clothing or belts, there was no assertion any investigation was conducted to ensure the guards were failing to follow ''instructions . . . nobody removes anything.''

[23] Quinn, in contradictory testimony, claimed he reinstated Incleton and Larry Smith because they disclaimed any interest in receiving money as a result of the grievance.

[24] While Gloe testified he had input in the decision to terminate the grievants, he did not attend the meeting where the discharge decision was made and the weight, if any, given Gloe's opinions, was not addressed. I therefore conclude this unsupported claim was not shown to be reliable. Quinn did not state he relied on any of Gloe's assessments or comments concerning what action, if any, should be taken regarding the grievants.

motivation.'' According to Respondent, the genesis of the grievances was Kane's ambition to be elected a union delegate and his desire to gain money for himself and others to enhance his popularity. Respondent does not assert the claim for wages was inappropriate if the grievance delay claim was found to be meritorious.

2. Lozano

a. *Lozano's grievance meeting*

Lozano commenced employment with Respondent April 11, 1975. He was a shop steward the last 10 years of his employment with Respondent. At the time of his discharge on November 21, he was a sorter and also worked next day air. There were no complaints about his work.

Employees complained to Lozano about the metal detector. Specifically, he heard complaints about the employees having to remove their shoes, rings and other metal objects, and having to pull up their shirts. After Kane prepared the grievance, Lozano signed it even though not all the claims applied to him. During the grievance meeting, Lozano readily admitted to Quinn he did not have to remove his shoes or boots. In explanation, Lozano said he was signing a general grievance. According to Lozano, during his grievance meeting, he informed Respondent ''I didn't write the grievance, I just signed a general grievance.''[25] Lozano informed Quinn he had to perform all the other acts described in the grievance, including being delayed on average 3 minutes a day because of the metal detector.

As was the case with all the other grievants that day, Arnold asked to meet with Lozano outside the conference room where the grievance meetings were held. Arnold informed Lozano:

> He said since I didn't remember none of the details he didn't . . . he didn't want me to perjure myself. And I didn't have no times or anything with me. He told me to withdraw my grievance and they would make it null and void and no disciplinary action would be taken against me. He said he didn't want to lose me as a shop steward, that I had been there for ten years.

Based on Arnold's representations, Lozano instructed him to withdraw his grievance. Lozano agreed to withdraw because he did not have to take off his shoes. Arnold had not consulted with Respondent concerning the effect of the withdrawals of the grievances and Respondent made no representations to Arnold or any of the grievants that withdrawal would render the grievances ''null and void.'' When Arnold informed Quinn that Lozano was withdrawing his grievance, Arnold said Lozano did not want to perjure himself. Quinn claims he then informed Lozano he would give him a decision later respecting the grievance. Lozano denied Quinn made this comment. Having found Quinn was not a reliable witness, I do not credit his claim he informed Lozano or other grievants that Respondent was reserving the right to act upon the withdrawn grievances.[26]

Quinn also claims he decided to fire Lozano because he lied during the grievance meeting when he said he did not know who wrote the grievance. Lozano denied making this statement. Lozano is corroborated by Gloe who testified, ''Harvey asked him if he knew who wrote the grievance and he said, I think or I believe Dan Kane did.''[27] I credit this admission against interest. Supporting this conclusion is the fact this reason was not included in Lozano's termination papers. Quinn never explained why Lozano was not informed this was a reason for his discharge. Gloe verbally informed Lozano he was being discharged for ''falsification of a company document and dishonesty.'' Gloe made the same statement to all the alleged discriminatees.

I credit Lozano's version of the grievance meeting. Lozano's recitation of this event gave the strong impression he was making an honest attempt to accurately recall the facts. Gloe's rendition of Lozano's grievance meeting was much more detailed than Quinn's. However, Gloe admitted he could not recall some of Lozano's answers to Quinn's questions and he was unsure of some of his other testimony. Quinn claimed Lozano altered his answers concerning the delays he was experiencing at the metal detector. Gloe said Lozano replied, to the best of his recollection, that he was delayed two to three times a week. I find Respondent's witnesses disparate recall of the Lozano grievance meeting, and for the other reasons mentioned here, support the conclusions they are not credible.

As Lozano did not have a problem with his shoes and perhaps his bag, Respondent inquired if he understood its honesty policy. It was at that point Arnold asked to speak with Lozano outside the conference room. Quinn also asked Lozano if he knew if a ''group'' or ''et al'' grievance could be filed. According to Gloe, Quinn said: ''don't you know you could have filed an et al for everyone and signed it and submitted, and Al said yes, I could do that.'' Lozano explained in his testimony he understood he ''was signing the general grievance on the metal detector because I had other problems that pertained to it.''

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[25] Respondent did not convincingly refute this testimony.

[26] Gloe corroborated Quinn. I do not find this credible corroboration. Gloe admittedly had poor recall and had inconsistencies in his testimony. He did not attempt to provide full and accurate responses. He did not appear to be candid and based on demeanor alone, I conclude his testimony is not credible. Therefore, Gloe's testimony will be credited only where credibly corroborated or if it is an admission against interest.

Further, assuming Quinn informed each grievant after they had withdrawn their grievances, ''I'll get my decision back to you later, or something of that nature'' inasmuch as each withdrawal had been accepted by Respondent, there is no clear showing Quinn informed each or any grievant of possible Company adverse action pending, based on statements made in the grievance. This failure lends additional credence to the grievants' testimony there was no indication withdrawal of their grievance did not lay the matter to rest. Their testimony concerning their reactions of surprise in light of their withdrawals, during their discharge meetings further supports this conclusion.

[27] Subsequent to this testimony, Gloe said Lozano claimed he did not know who wrote the grievance. I find this inconsistent shifting testimony supports my conclusion Gloe was not a credible witness. Gloe then shifted gears again and testified Lozano denied knowing who wrote the grievance in the grievance meeting but admitted in the arbitration of his discharge grievance that he knew Kane had written the grievance. At the very least, Gloe's testimony was confused and confusing. He contradicted himself several times in what appeared to be a tailoring of testimony to meet one or more of Respondent's litigation theories.

Respondent failed to advance any persuasive reason why it did not consider the nine grievances as a ''group'' or ''et al'' grievance. Quinn admitted he was surprised at Arnold's testimony that the Union does not permit group grievances. Respondent also failed to indicate what, if any different result would have eventuated if a ''group'' or ''et al'' grievance had been filed by the nine grievants. Further, Respondent did not claim it was precluded from considering the nine grievances as a ''group'' or ''et al'' grievance, if in fact there was such an animal.

Respondent admittedly noted the grievances read the same and that some had one or more items crossed out. Rivas informed Respondent ''that these were problems that were—that were being encountered by all employees, and this was written to show, you know, to show problems that all employees, you know, would have.'' There was also a universality or group character to the grievance for at least one or more of the alleged incidents occurred to each of the alleged discriminatees.

There was no clear and convincing refutation of this testimony. Respondent knew the grievants were filing the same grievance and were claiming they were being delayed at the guard shack because of the manner in which they had to egress through the unit and the guards' actions. Interestingly, neither Quinn nor Gloe claimed that, at the times here pertinent, they exited the facility at the same time as the twilight shift. While the twilight shift did not all leave at once, Saicoe admitted to altering the frequency with which the unit went off during Respondent's peak season because it would cause delays.

The peak season commenced in October when Respondent began hiring more employees every year. Quinn admitted he knew the complaints raised in the grievance were lodged during peak season and had thought about this timing. Quinn knew more employees were departing during peak season for Respondent had more employees at this time. There is no claim Quinn or other representatives of Respondent investigated whether the increase in personnel during peak season induced a need to alter the departure routine at the guard shack prior to or subsequent to the grievance meetings.

After the grievance meeting, Quinn informed Gloe he had to review ''this.'' Gloe could not recall any recommendation he may have given Quinn concerning Lozano.

b. *Lozano's Discharge*

At Lozano's discharge interview, he insisted Kane be present as his representative, and Gloe acquiesced, even though he had made arrangements to have Hogshead, a line employee who was not a shop steward, present as a witness. Gloe informed Lozano he was being discharged. Lozano ''asked him for what . . . [Gloe] said for falsifying documents . . . [Lozano commented] I didn't understand, I had withdrawn my grievance. And that I didn't falsify any documents.''

Lozano's discharge papers gave as the reason for his termination:

> failure to fulfill the obligations and requirements of the job—dishonesty, falsifying a document. On 11-20- 90 the grievance Al filed with Local 396 was not his actual grievance and was not applicable to Al in all statements made on the grievance. Asking for monetary wages to be paid for all Hub employees.

Lozano admitted Respondent informed him he was fired for falsifying a grievance and that was dishonesty in the Company's opinion. Another predicate Quinn advanced for his discharge decision was the lack of any notes by Kane and Lozano. He claimed both Kane and Lozano had a practice of keeping very good notes and produced them at other grievances. Inasmuch as Kane only participated in approximately two prior grievances, I find this reason is a resort to hyperbole and supports my determination to not credit Quinn's testimony and find it a pretext. Other than Quinn's bare assertion, Respondent failed to establish Kane and/or Lozano maintained a practice and procedure of keeping very detailed notes in their presentations of grievances. There was no predicate established for this failure by Respondent. There was no reason advanced for Respondent's failure to accept Kane's offer to make the desired notes and refile the grievance or asking Lozano to do the same.

On brief, Respondent also argues the fact Kane and Lozano were running for union delegate positions buttressed the termination decisions for it is probative Kane and Lozano had a hidden agenda in filing the grievances; that of enhancing their respective campaigns for delegate. I find this argument unpersuasive. Lozano had not decided to run for the position by November 21. The record fails to demonstrate such action would enhance their respective campaigns for delegate. Further, there is no showing one or both of them was opposed in their delegate races. There was no demonstration there was a need for enhancing their campaigns or that there was some kind of nexus between the delegate race and the filing of the grievance. There was also no evidence Respondent knew of their candidacies at the time it decided to terminate them. This ''add a pearl'' defense is another indication of proscribed motive.

3. Marmolejo's grievance meeting and discharge

Marmolejo had worked for Respondent more than 5 years as a bulk irregular driver. During the late summer, Marmolejo began experiencing problems at the metal detector including: ''Waiting in line, sarcastic remarks from the security guards, being asked to lift up the shirt. And if the thing went off we were asked, well, what did you steal this time. Just remarks like that.'' On one occasion, Marmolejo was wearing steel toed shoes and he was required to remove them before being permitted to leave Respondent's premises. According to Marmolejo, he had to wait in line an average of two to three times during a 2-week period, a few minutes each time.

Marmolejo was one of the individuals that complained to Kane about problems at the metal detector. Another employee who complained and whom Marmolejo referred to Kane and Lozano was Mauricio Alverez. In one conversation among approximately four employees, the employees mentioned problems such as ''I had to lift up my shirt, that I was accused of stealing something.'' Marmolejo described the comments as ''the same thing that I went through.'' While this discussion was ensuing, Kane and Lozano passed by and were called over to discuss the problem. Kane suggested filing a grievance.

Kane prepared the grievance, gave one to Marmolejo who said he ''just skimmed it and signed it and gave it back to Mr. Kane.'' The incidents that happened to Marmolejo listed in the grievance included taking off his shoes, and lifting up his shirt. Marmolejo never brought a bag to work and did not wear a wedding ring. He signed the grievance that mentioned those matters because some of the complaints ''happened to me.'' Marmolejo, during the grievance meeting, also informed Quinn and Gloe he signed the grievance even though he did not have to take off a ring because Kane had crossed out with a red marker the reference to wedding ring. Quinn asked him ''If I knew that falsifying a legal document I can be fired.'' Marmolejo replied some of the incidents related in the grievance ''happened to me.''

Marmolejo appeared open and honest. He readily admitted when he could not recall a fact or was unsure about an event. He was very frank and did not appear to engage in any dissimulation. He gave the strong impression he was making an honest attempt to accurately recall the facts. Based on his demeanor, I credit his testimony.

When Marmolejo met with Arnold outside the conference room, Arnold informed Marmolejo ''asking for any money would have been wrongful if it went to arbitration and we were rewarded any money whatsoever. And I asked him what do we do. And he said we withdraw the grievance.''[28] Marmolejo then asked Arnold what would happen if he withdrew the grievance. Arnold replied, ''nothing should happen.'' Marmolejo withdrew the grievance and Respondent accepted the withdrawal, as was the case with all the grievants. Marmolejo agreed to withdraw the grievance because he was frightened by Quinn's statement; he was afraid he would lose his job. Gloe could not recall what if anything he told Quinn concerning whether Marmolejo should be discharged after the grievance meeting; in fact Gloe could not recall if he was asked for a recommendation.

According to Quinn, he determined to discharge Marmolejo because:

> During Mr. Marmolejo's meeting, during the discussions, as I went through each and every one of the elements, when it got to the point where there was nothing in that grievance that applied, and that there were edits done, and he came to the point, or conclusion—once he realized that he was contradicting himself, or he had said something that was not believable, and I [told] him that I didn't believe it. And I asked him, do you understand the dishonesty policy. When the dishonesty question comes up, the flag went up. To both parties. That we have a problem here.

I note Quinn engaged in hyperbole when claiming none of the complaints in the grievance applied to Marmolejo, which supports my conclusion he was not a credible witness and the reasons advanced for the discharges were pretexts.

Marmolejo was fired by Gloe the next day, November 21. Gloe informed Marmolejo he was ''being fired . . . for falsifying a legal document, for failure to fulfill a job obligation and dishonesty.'' Marmolejo inquired ''about the dishonesty, how can I be fired for being dishonest when I was telling the truth the night before. He said I was dishonest in signing the grievance.''

After the discharge meeting with Marmolejo, Gloe completed the discharge form, giving as the facts leading to the discharge: ''On or about Oct. 23, 90 filed a grievance with incidents listed that did not occur—signed and processed with the intent to defraud company of money based on the false statements.'' Gloe admitted he completed the discharge forms for most if not all the grievants after they had been discharged.

After his discharge, Gloe informed Marmolejo he had to wait to be escorted from the premises and, ''He told me that I should watch out who my friends are. And that being friends with Al and Dan got me into this trouble.'' Gloe also told Marmolejo ''he hated to see me leave.'' As noted below, this statement lends support to the conclusion Respondent's actions were based on proscribed motives.

4. Silva

Silva had been off work for about 14 months due to disability. He had been severely injured in a motorcycle accident and had returned to work just days prior to signing the grievance. Silva had been employed by Respondent for 15 years prior to his discharge. While on disability, Silva went to the Hub on occasion to complete paperwork. On one of these occasions, he estimated in mid-July, he noted he was required to pass through a metal detector to exit the facility. He experienced a problem exiting, which he attributed to the existence of steel rods and metal plates implanted in his body as a result of the accident.

On October 23 he returned to work. Kane welcomed him back to work, informed Silva he was a shop steward and asked him to read the grievance and sign if it pertained to him. Silva jokingly inquired if Kane was trying to get him fired already.[29] Silva signed the grievance for he considered it a ''general grievance for all employees,'' in the nature of a petition. He was also concerned the steel rods and metal plates within him would cause problems at the metal detector.

During his grievance meeting, Silva admitted lying to Quinn by telling him he had to take off his wedding ring at the metal detector. He lied because he was scared and nervous. When Quinn asked if he ever had to take off his shoes, Silva replied in the negative. Silva explained employees hired before about 1983 did not have to wear work shoes; they could wear tennis shoes. He also admitted he never had to open a bag. On cross-examination, Silva admitted first telling Quinn he did not have a bag and then saying he did have a bag.

Although admitting he was not delayed at the metal detector every time he went through it, he had been informed by fellow employees the guards varied the sensitivity of the device. Silva did observe employees standing in line in front of him experiencing difficulty at the device, but he could not

[28] Arnold never explained why it was ''wrongful.'' As noted elsewhere, no other witness offered an explanation why Arnold and Respondent determined the request for time lost wages was improper.

[29] Kane did not recall portions of this conversation and did not consider Silva as close a friend as Silva considered Kane; Silva thought Kane was a good friend. These differences in testimony, while noted, do not warrant an adverse finding on their credibility, considering their entire testimony and considering my close scrutiny of their demeanor. Although I may not believe all their testimony, the testimony I have credited has been included in this decision.

recall any of their names. He made these observations when he visited the Hub to complete paperwork.

When Quinn asked if he had to wait to leave the facility, he did not recall his reply. Quinn then asked Silva, ''[H]ow can I request for money from the company when I was not even working at that point in time.'' Silva then asked if he could speak to Arnold, and he and Arnold left he conference room. Silva told Arnold ''they got me on the money part.'' Arnold inquired, ''[Would you like to withdraw your grievance so you won't perjure yourself . . . I said yes, because I know the company could get me for lying, they could fire me for lying.'' Upon returning to the conference room, Arnold asked Quinn ''if it was okay for me to withdraw my grievance'' and Quinn replied, ''yes.''

Silva did not consider the claim for pay at the time he signed the grievance; he just considered it a ''general grievance for all employees.'' According to Gloe, during his discharge grievance, Silva said: ''Dan also said it would be a good idea to get money from the company, but especially, the only way to get the company's attention is to ask for money.'' Gloe did not say Respondent ascertained when Kane was claimed to have made the statement, before or after November 21. On this record, I find this testimony is too ambiguous to support a conclusion the claims of delay and for money were mere contrivances. On the contrary, the inclusion of the wage claim was an effective attention getting device. Gloe was not asked by Quinn for a recommendation concerning Silva's discharge or reinstatement, and he did not volunteer any opinion on these issues. He did inform Quinn he did not believe Silva.

Quinn said he decided to terminate Silva because: ''Silva said he had a problem, and he wasn't even working, he was out on disability for fourteen months prior to the grievance being filed.'' Quinn did not claim he considered Silva's concern about the metal in his body impairing his egress and creating problems.

Silva was discharged the next day, November 21. Gloe told him he was sorry, that he was being terminated for falsifying a document. After his discharge, Gloe wrote as the facts supporting the termination:

> On 10–29–90, Rudy filed a grievance with Local 396. He submitted a falsified document requesting monies to be paid to himself and all Hub employees from July 1990. Rudy was on an off the job injury for 14 months and did not return to work until 10–23–90. Also, there was falsification of facts submitted in the grievance that did not pertain to Rudy.

Silva explained to Respondent he thought a grievance and a petition were the same, and his signing the grievance was just a manner of informing Respondent there was a problem concerning the metal detector. He thought it was a ''general grievance between all the employees in the building.'' Why Respondent chose to believe Larry Smith's petition claim and not Silva's was unexplained.

5. Villa

Villa worked for Respondent about 2 years prior to his termination. His position was called ''pick off for system one'' which included sorting packages by zip code. He recalls the metal detector being installed in the summer of 1990. The only problems he experienced at the metal detector were the change in his pocket and having to lift his shirt to display his metal belt buckle. He observed other employees opening their bags, lifting their shirts, and removing the change from their pockets. He had to wait in line to exit at the metal detector almost daily. Villa had the device beep more than once while he was trying to exit, requiring repeated journeys through the unit. The average wait, he estimated, was 5 to 7 minutes.

During a break period in October, Kane handed him a copy of the grievance,[30] Villa read it briefly, then signed it. He admitted he never had to remove his shoes nor open his bag, and he did not recall if the grievance had a reference to wedding bands.[31] Villa explained his action as follows: ''Because why I had signed this, I signed it—to myself meant as on a whole, like all our problems on it. And I knew that lifting shirt was my problem.''

When Villa attended his grievance meeting, Quinn informed him, ''Do you realize you falsified a document?[32] And it came as a surprise to me. And I said no I didn't.'' Quinn then commented, ''Do you realize you could be terminated for this?'' Villa replied, ''No I didn't.'' Arnold then asked Villa to step outside the conference room and told Villa it would be best if he withdrew the grievance. ''And if I withdraw it I can go back to work and forget about all of this.'' Villa agreed to withdraw the grievance commenting that he did not want to lose his job. When Villa reentered the conference room, Quinn was informed of his wish to withdraw the grievance and accepted the withdrawal. Like the other grievants, they were given their grievances to sign in acknowledgment of their withdrawals.

Villa admittedly had poor recall of the grievance meeting. He did not deny Quinn asked him how frequently he was delayed by the metal detector. He said the most times he observed the device beep sequentially for the same individual was three times, then the guard would get frustrated and let the individual through. The only time Villa could recall exiting without any delay was when he worked overtime and left at a later time.

After all the grievance meetings, Gloe discussed Villa with Quinn, but he could not recall the content of the discussion. Quinn did not ask Gloe for a recommendation concerning Villa's discharge or reinstatement. Gloe does recall informing Quinn he did not believe Villa's statements. Gloe does not recall if he gave Quinn any reasons for his belief. Gloe did not participate in the meeting where it was decided to termi-

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[30] Kane handed McLendon and Silva a copy of the grievance at the same time. The three men were sitting on a dock waiting to commence work when Kane approached them, handed each a copy of the grievance, and asked them to read it.

[31] The wedding band reference was crossed off Villa's grievance in red marker by Kane, in the same manner as Marmolejo's.

[32] Gloe acknowledged Villa admitted having read the grievance prior to signing it, that he had discussed it with Kane, and Kane wrote the grievance. Although Villa exhibited poor recall, he did appear to be attempting to answer the questions posed to him fully and openly. He did not seem to be attempting to mislead or misrepresent. Accordingly, I credit his testimony where he shows clear recall of the event. One such instance is that he received the grievance from Kane prior to the commencement of work. Gloe could not recall whether there was any discussion about whether Villa understood he was making a claim for money or whether he intended to make a claim for money.

nate the grievants and the weight Quinn accorded his opinions was not clearly and fully presented here.

Gloe discharged Villa for falsifying a document. Villa replied: ''I signed a grievance and I didn't think I could [get] fired for that. I thought the grievance was like to resolve something. And he [Gloe] just shook his head and kept writing.''

6. Rivas

Rivas had worked for Respondent about 5 years as a package sorter. He first noticed the metal detector some time in the first half of 1990, around February. The problems he experienced involved having to go through the device more than once because it beeped, look for metal, remove the metal, and try again until it stopped beeping. Rivas testified he had to remove a ring, a belt, keys, coins, and a watch. He observed other employees experiencing similar problems. The unit caused delays; the frequency and extent of the delay varied, sometimes he would be delayed daily, other weeks, only twice.

Rivas discussed the device with coworkers, including Jerry Clayton, perhaps Mark Skipper, many whose names he could not recall, and Kane. The conversations with Clayton and Skipper included discussion of the ''great inconvenience'' the metal detector caused and speculation concerning the legality of searching the employees ''since they weren't looking for anything specific.'' Rivas asked Kane, ''[W]hat was going on with the metal detector if, you know—that it was a drag. And if there was anything in the union contract that said we could be searched by UPS.'' Kane said he would ''look into it.''

In October, during a break, Kane gave Rivas one of the form grievances ''to try to get rid of the metal detector.'' Rivas executed one of these forms after ''skip[ping] through it.'' Rivas does not have a wedding ring and did not have to take off his shoes but signed the form ''Because when I read it, these were things that us as employees as a whole were experiencing.'' In further explanation, Rivas testified: ''When I skimmed through it, I didn't see it as stating you had to take off your shoes. And not only that, I had—I had seen someone else take off their shoes at the guard shack, and I figured it was only a matter of time before I was asked to take off mine.'' After consulting with Rivas and sometime prior to submitting the grievance to the Union, Kane crossed off the reference to ''wedding'' but retained the reference to a ring[33] in Rivas' grievance.

During the Rivas grievance meeting, Respondent asked if Rivas signed the grievance. Rivas said, ''yes'' and started describing the problems he was experiencing at the metal detector. Rivas commented ''that we as employees, we were concerned that, you know, being searched, if that was even legal or not to be searched, you know, leaving our work area. Because the metal detector would beep and we had to remove the things from our pockets, hand it over to the security guard, you know, which—directly to his hands.''

Quinn then started asking Rivas questions, going through the grievance line by line. In answer to Quinn's questions, Rivas admitted he was not married and he did not have a wedding ring but he had another ring which he had to take off about three to four times. Rivas also admitted he never took off his boots but he had had problems with his boots. He also informed Quinn he did have to lift up his shirt several times. Rivas recalled telling Gloe he never complained to anyone in management about the metal detector, he explained to Quinn he was not sure of the grievance procedures.

Quinn asked Rivas why he signed a grievance containing complaints that did not apply to him. Rivas replied ''that these were problems that were—that were being encountered by all employees, and this was written to show, you know, to show problems that all employees, you know, would have.'' Further, Rivas explained Respondent required the employees to wear safety boots which have metal shanks, toes, and eyelets. Quinn observed Rivas' boots did not have metal, and Rivas explained he specifically purchased boots with less metal because he observed another employee having to remove his boots after the guard pointed to the boots. Arnold commented it was very serious, ''because by saying that we had to remove our boots, we were claiming strip search.'' Rivas candidly admitted telling Quinn he had not had a problem with the metal detector ''lately.''

Quinn then commented ''that we're dealing with dishonest acts here and borderline fraud, fraudulent act . . . . by signing it, it was being referred that it was my grievance [about removing boots] and that those were my words now.'' Rivas replied:

> that he [Quinn] should realize that—that this was a grievance that it was —that it was a copy of a grievance, and that there was many different grievances out there, the same exact ones, that people were signing. And by now, he should have realized that it was written by Dan Kane.

Quinn then proceeded to inquire about the conversations he had concerning the metal detector, and Rivas informed him he could not recall the dates of any conversations but the location was in the parking lot. Quinn also asked Rivas if Kane solicited the grievance; and Rivas informed him Kane gave him a copy in the restroom during break, Rivas skimmed it and signed. Next Quinn asked what Kane said when he distributed the grievance. Rivas replied:

> That Dan had told everyone that if anything here pertained to them to sign it. That he was collecting signatures to try to get rid of the metal detector for illegal searches, which is used for illegal searches.

When Quinn asked how the amount of weekly delay was calculated, Rivas informed him it ''had been worked out by Dan Kane.'' Quinn then wanted to know how many times Rivas had been delayed by the metal detector. Rivas said numerous times, he had never kept count so he did not have a number. Rivas also explained that the sensitivity of the device seemed to vary; sometimes he could exit without having to remove his keys, change, and everything metal, other times if he had a dime in his pocket, it would beep. Quinn inquired why Rivas was requesting all employees be compensated for time lost and Rivas answered: ''that all employees had to go through the metal detector, therefore, they should be compensated for the time lost.'' Rivas admitted to

[33] Rivas did have a school ring that he had to remove on occasion when passing through the device.

Quinn he did not know why the July date was chosen in the form grievance.

Arnold entered the conversation at that point and informed Rivas he could not request ''anything for anyone else besides myself'' and said Kane ''cannot solicit grievances.'' Arnold then asked to meet with Rivas outside. Once outside the conference room, Arnold told Rivas he should withdraw the grievance ''because if it went to arbitration, my words would be different from the words that were written on the grievance, and that I would be terminated.''[34] Arnold then informed Rivas he would be withdrawing his grievance, the problem had been resolved for the metal detector ''was no longer as sensitive as it used to be.''

Arnold then gave Rivas a copy of the grievance and instructed him to write on the bottom he was withdrawing the grievance; Rivas then signed the withdrawal notation. Quinn gave Rivas another copy of the grievance with a withdrawal notation and asked him to sign it. After Rivas signed the withdrawal notation, ''everybody [including Quinn] just shook their head'' in an affirmative manner, ''like an agreement.''

Gloe testified Rivas could not recall the specific dates and times he experienced problems with the metal detector, which Rivas readily admitted. He could not recall what he said to Quinn concerning Rivas after the metal detector grievance meeting. Later in his testimony, Gloe recalled telling Quinn he did not believe Rivas' statements were true. Quinn did not ask Gloe for a recommendation concerning the termination or reinstatement of Rivas.

The next day Gloe fired Rivas. Gloe said, ''He regretted this, but that I was being terminated for failing to fulfill my obligations as an employee of United Parcel Service. Specifically, fraud and dishonesty.'' Subsequent to his termination, Gloe completed the discharge form, stating the facts leading to the termination as follows:

> On 10–29–90, Nick filed a grievance with Local 396. He submitted a falsified document requesting monies to be paid to himself and for all Hub employees from July 1990, and falsification of facts as submitted in the grievance.

Gloe asked for Rivas' company identification card, and like the other alleged discriminatees, he was escorted off Respondent's premises.

After his termination, Rivas spoke to Lindeman of the Union to inquire why Smith and Incleton were reinstated. Lindeman told Rivas it was because Respondent understood they were telling the truth, and there was some contradiction in Rivas' story.

Rivas, like the others who signed the grievance and were terminated, filed a grievance over their discharges. At Rivas' discharge grievance meeting, he informed the attendees he was not verbally ordered to lift his shirt, remove his ring, or remove his boots by the guards; he did these things to enable him to pass through the metal detector and leave the premises. Rivas testified he lifted his shirt, removed his ring, and purchased boots with less metal:

> Because if it beeped you had to show that you didn't have anything on you. And if—for example, if it was the boots causing it, I mean, what else could you do. If it—I used to always wear shorts, and I had absolutely nothing on with no bulges or nothing that would show, so I had to lift my shirt off, and then that would eventually get me through. Otherwise, they would hold me up again.

Rivas indicated he thought denying him egress until he satisfied the guards was tantamount to being ordered to lift his shirt to demonstrate he was not hiding any contraband. Further, the guards gave him hand signs, first a stop sign, and then a signal to lift his shirt. Also during Rivas' discharge grievance, Quinn said: ''I'm going to make an example of you people.'' I find this statement is another indication of proscribed motive.

At the arbitration of the discharge grievance, Rivas commented there were mistakes in the metal detector grievance, grammatical mistakes. The seven alleged discriminatees arbitrated their terminations, and as indicated above, none of them prevailed. It was these arbitrations the Board initially deferred to, which the Circuit Court of Appeals for the Ninth Circuit remanded for consideration in the instant proceeding. Therefore, the decisions of the arbitrator in those instances will not be considered here.

7. McLendon

McLendon had worked for Respondent as a ''take-off''[35] a little over 1 year at the time of his termination. He recalls first seeing the metal detector in early 1990. He experienced problems going through the device, principally delay. He noted other employees were subjected to the same delays. Although he observed others had to remove their rings, McLendon did not experience that problem. He also observed others having to remove their shoes, and he was required to remove his shoes. McLendon had to lift his shirt at the metal detector and saw others doing the same. On those occasions he carried a bag, he would have to open it.

According to McLendon, he was delayed at the exit daily an average of 3 minutes. McLendon spoke to Kane once about his problems at the metal detector at the time he executed the grievance. McLendon corroborated Villa and stated he received the grievance before work. When Kane gave him the grievance, he read it over and signed it because they were attempting to correct the problem with the metal detector and receive backpay for the time lost ''off of the clock.'' Kane crossed out the reference to wedding ring in McLendon's grievance after it had been signed. Respondent never claimed these alterations in the grievance by Kane were a factor in its decision to terminate Kane.

In explanation of why he signed the grievance even though he did not wear a wedding ring, McLendon said, ''I

[34] Rivas also testified Arnold told him in confidence Kane was causing the Union ''a lot of problems'' and he, Arnold, had not seen the grievance because Kane had turned them in to Respondent directly. Arnold denied these allegations. I find Rivas the more credible witness. I find Rivas' detailed rendition of events, including this meeting, the more credible version. Rivas' recitation of events was accomplished with considerably persuasive detail; he gave the strong impression he was making an honest attempt to accurately recall the facts. Rivas was very frank and did not appear to engage in any dissimulation.

[35] His duties included sorting packages by destination, cleanup, and loading trucks.

thought—I didn't take it to be that technical. I thought it was, you know, as a whole group. I didn't think it was meant to be each individual person.'' McLendon testified Kane had not consulted him prior to crossing out the reference to wedding ring, but there was no question he did not wear a wedding ring. He also testified Kane told him he should sign the grievance because he could then receive backpay for the time he lost waiting at the metal detector.

McLendon clearly testified he never informed Respondent Kane solicited the grievance while McLendon was on the clock. Repeatedly, McLendon testified he was off the clock when Kane approached him concerning the grievance. I conclude any claim by Respondent it terminated Kane in part because he solicited grievances while employees were on the clock is without merit. Kane's discharge forms did not contain any reference to a violation of Respondent's no-solicitation rule, and Gloe did not claim to have informed Kane at his discharge that any violation(s) of the no solicitation rule was a reason for his discharge.

Respondent's unsupported claim Kane solicited grievance's in violation of the no-solicitation rule is another of its ''add-a-pearl'' defenses and is another indication of proscribed motive.

As was the case with all the other grievants, Respondent called McLendon to the conference room for the grievance meeting without any prior warning or preparation. McLendon had not met Arnold before this meeting. After he entered the room, Quinn placed his grievance before him and inquired if McLendon was married or wore a wedding ring; McLendon said no. The portion of the grievance referring to the wedding ring had been crossed out in red marker.[36] Quinn asked McLendon if he had to lift his shirt, and he replied yes. He does not recall if Quinn asked if he had to open his bag and does not believe Quinn inquired about the 15 minutes pay per week. When asked how long he had to wait, he replied it varied, ''sometimes it takes longer than others.'' Prior to the installation of the metal detector, Respondent routinely examines employees' bags. This practice is not claimed to have caused delays.

Quinn recalled McLendon claimed everything in the grievance applied to him except the boots and wedding ring. According to Quinn, McLendon also indicated he had read the grievance and knew it was for money. Although Quinn admitted he could not recall the details of his questioning of McLendon, he claims McLendon initially indicated all the incidents mentioned in his grievance applied to him and then upon questioning admitted some of the incidents did not apply to him.[37]

Quinn further testified:

> JUDGE WIEDER: During the course of the grievance meetings did any one of the seven that were discharged and remain discharged, indicate to your recollection, that they considered it a general grievance applicable to events that had happened to various employees, not just themselves?
>
> THE WITNESS: Specifically I don't recall any one person saying that. I recall it was said at some point in time in there. And when I talked to them about it I asked, you know, just went through, did you fill out the top, did you read the grievance, did you understand the grievance, did you understand you were requesting money for the grievance.

Accordingly, I find Respondent knew on November 20 that at least some of the alleged discriminatees understood their grievance(s) to be a general grievance, not specifically applying to them individually in all particulars, but relating incidents occurring at the metal detector which were causing loss of time while the employees were off the clock. Quinn also admitted when some of the alleged disciminatees admitted one or more of the complaints contained in the grievance did not occur to them, they informed Respondent they saw it happen to other employees. Since these are statements contrary to Respondent's interests, I credit this testimony of Quinn. Quinn also asked McLendon, as he did all the other grievants, if they were familiar with Respondent's honesty policy. Gloe claims Quinn reviewed the policy with all the grievants, and McLendon informed Gloe and Quinn he understood the policy.

In general, McLendon exhibited poor recall of the grievance meeting. He did not exhibit similarly poor recall of the discharge meeting with Gloe and Mel Smith. Under these circumstances, his failure to recall Quinn's specific questions and his answers does not warrant discrediting his testimony where he was surprised and concerned about the loss of his job; he would naturally focus on those aspects of the meeting. The unusual aspect, the surprise of the grievance meeting, and the information the grievance could lead to his termination are of such a nature as to be the central focus of his recollections. Based on his open and forthright demeanor, I credit McLendon's testimony.

After Quinn concluded his questioning, Arnold asked to speak with McLendon outside the conference room, and once outside, Arnold ''told me it would be a good idea to withdraw my grievance, and in doing so, I would be able to keep my job.'' Arnold and McLendon then returned to the conference room, and McLendon informed Quinn and Gloe he would withdraw his grievance. He made a notation on the grievance to that effect and signed it. McLendon understood the withdrawal to render the grievance ''null and void. It didn't exist any more.'' Respondent accepted the withdrawal. McLendon was then instructed to return to work. Quinn asked McLendon if he had been coerced to withdraw his grievance, and McLendon replied, ''no.''

McLendon was discharged by Gloe on November 21. Several other alleged discriminatees were already waiting outside the office. When McLendon's turn came to go into the office, Gloe and Mel Smith were present. Gloe informed him

[36] Although McLendon had poor recall, it was undisputed the wedding ring reference in his grievance had the same red marker strike through previously described.

[37] Gloe claimed McLendon stated none of the incidents related in the grievance occurred to him. This contradiction of Quinn and exaggeration are further reasons to not credit Gloe where he is not credibly corroborated or making an admission against Respondent's interests. I also note during his testimony concerning McLendon, as well as throughout his testimony, Gloe volunteered information, and was not directly responsive to some questions. I informed counsel on the record, ''Counsel should also know that volunteered information is another factor I consider in making my credibility determinations.''

he was being terminated for falsifying a document.[38] McLendon informed Gloe that Arnold told him if he withdrew his grievance ''that I would be able to keep my job.'' McLendon does not recall if Gloe or Mel Smith responded to this statement. McLendon then signed some discharge documents and was escorted from the premises.

At some point in time, McLendon informed Respondent he withdrew his grievance because he realized his mistake.[39] It appears this statement was made after his discharge. I find this statement is not an admission of wrongdoing or deliberate falsification. The term mistake could also refer to McLendon's failure to understand how Respondent would consider the grievance as an individual claim which must pertain only to the grievant that signed the document. As McLendon testified, he did not understand the document was a grievance; he did not know ''what a grievance was.'' He understood they ''were making a motion to stop or to fix the problem that we were having, and which would include back pay for time lost off the clock.''

Gloe recalled discussing McLendon with Quinn, but could not recall any of the details of the conversation. Subsequently, Gloe testified the opinion he gave Quinn about McLendon was ''I did not believe his statements in the metal—detector grievance meeting.'' Quinn did not ask and Gloe did not volunteer the basis for his belief. Quinn did not ask Gloe for a recommendation concerning McLendon's discharge and/or reinstatement.

8. Larry Smith

Larry Smith has worked for Respondent for about 19 years. He is currently a sorter. He claims he signed the grievance under the belief it was a petition and was told it was a petition. As noted above, the grievance he signed has the title at the top, in large bold letters, ''GRIEVANCE REPORT.'' Larry Smith also went to Kane and told him to cross out the reference to wedding ring.[40] Larry Smith was the only grievant who testified he did not have any problems nor did he notice anyone else having any problems when he exited through the metal detector. He was also the only grievant who testified the device only beeped occasionally and never beeped more than once. He never explained why he did not request Kane alter any other portions of the grievance that did not apply to him. This disparity was unexplained.

Larry Smith was ''close'' to the last person leaving from the twilight shift, so only three employees or less exit when he does. He never wore a belt, he wore tennis shoes, he never carried a bag and, as previously discussed, he did not wear a wedding ring. Thus his claim he was not delayed at the metal detector, if credited, under these circumstances, is not probative the other grievants were engaging in dissimulation or exaggeration. There was no testimony Larry Smith ever exited at a time when there were more that a couple other employees leaving or that he ever observed other employees going through the metal detector.

Larry Smith asserted he signed the document because he was shamed into it; Kane told him a female employee was forced to raise her blouse by one of the guards. Some of the employees had heard a rumor to this effect, but no one claimed to have seen such an occurrence. I do not credit his testimony, he appeared to patently favor Respondent's position rather than to be attempting to testify in an open and honest manner. Moreover, Larry Smith exhibited poor recall, a portion of his testimony was elicited through the device of leading questions; and his testimony was self-serving and exaggerated. At times he engaged in speculation; for example, he speculated the metal detector had been installed ''at least around '85.''

Larry Smith's grievance meeting followed the same format as those previously described. He informed Quinn he did not file a grievance, ''he was led to believe it was a petition against people being harassed at the guard shack . . . I was told that female employees were being hand searched and a couple . . . had their blouses lifted up or had to lift up their blouse in front of the guards.'' Larry Smith claimed Kane told him of these incidents, Kane denied the allegation. Larry Smith admitted being close friends with Incleton, who was a volatile individual.

Incleton had complained to Larry Smith that the guards had been harassing his wife. Kane gave Incleton and Larry Smith their copies of the grievance at the same time, they were sitting together when Kane approached them. Incleton did not claim he was induced to sign the grievance by Kane saying a female employee had been required by one of the guards to lift her blouse and/or the document was a petition. This lack of corroboration by a current employee and friend supports my conclusion Larry Smith is not credible.

Larry Smith told Respondent he was not making a claim for money, he was only concerned that employees were being harassed. He informed Quinn he had only read the part of the grievance referring to a wedding ring, that he did not read the entire grievance. In explanation of his action, Larry Smith informed Quinn he had been misled by Kane, he thought it was ''more or less a petition that it had really been more or less about people being harassed, that the whole incident wasn't about getting money or being paid going through the metal detector and that I felt that I had been misled.'' Larry Smith exhibited very poor recall about the metal detector grievance meeting; he could not recall the questions asked by Quinn or his answers.

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[38] McLendon's discharge papers noted ''falsification of document: grievance filed with false information on 10/23/90—incidents cited not true. Dishonest: attempted to collect money on grievance noted above by using false information.'' Quinn filled out the fact section of McLendon's discharge because Gloe forgot to complete that section after McLendon had been discharged.

McLendon noted on his discharge the advice he had received from Arnold that if he withdrew his grievance he would retain his job and only if he did not withdraw the grievance could he be fired for falsifying a document.

[39] McLendon explained, ''[M]y mistake was not reading it thoroughly and . . . I should have taken it technically.'' At some time after his discharge, Gloe claims, McLendon also said he was discharged for a good reason. Later, Gloe recalled during the discharge grievance meeting or arbitration, when Quinn asked him why he thought he as fired, McLendon answered: ''I think I was fired for Union activity.''

[40] Larry Smith testified when Kane was soliciting him to sign the grievance he said he would cross out the reference to a wedding ring ''to spice it up.'' How removal of this reference spiced up the grievance was unexplained. If this confused testimony was intended to explain why Kane put in a reference to a wedding ring, then why did Larry Smith ask only this item be removed from the document by striking it out, rather than all the items he now asserts do not apply to him? Larry Smith's confused testimony further impairs his credibility.

Larry Smith was fired the next day for the same reasons as the other grievants and shortly thereafter filed a discharge grievance with the Union. On his discharge form, in the employee's comments section, Larry Smith wrote ''I would like statement I was dislead to believe that it was a petition and not a greives, I mistakely didn't read it.'' [sic] The form did not have any comments filled out by Respondent in the facts section.

On his discharge grievance, Larry Smith claimed Kane informed him of only one occurrence where a female was requested to lift her blouse, not the several he referenced in his testimony. His discharge grievance also claims he did not read it, and during the grievance meeting, when he learned it was a grievance immediately withdrew it.[41] He did not know the grievance included a request for money. Later in his testimony, he recalled it was Arnold who advised him he could be fired for filing the grievance and that it should be withdrawn. Gloe told Quinn he believed Larry Smith was telling the truth, he did not give Quinn any reasons for this opinion.

During the grievance meeting, he was informed the document was an attempt to ''extort or take money from the Company . . . .'' Larry Smith did not want to engage in a dishonest act and he was concerned he would be fired. He recalled at one point in the meeting one or more of Respondent's representatives appeared angry with him and Mel Smith ''stood up and asked me, I'd worked for this company for so long, why would I try to take money from this company?''

In his testimony, he claimed his grievance had been altered after he signed by the addition of everything after wedding ring.[42] He did not make a similar claim in his discharge grievance. He also later admitted he got a copy of the grievance at the same time and similar to the one given Incleton. Incleton never claimed his grievance had been similarly supplemented after execution. These contradictions further support the conclusion Larry Smith was not a credible witness.

Larry Smith and Incleton had their discharge grievance meetings on the same day at the same location. They went to the meetings together but had separate meetings. Larry Smith informed Respondent he thought filing the grievance had been a mistake in both the metal detector and discharge grievance meetings. Respondent decided to reinstate Larry Smith after the discharge grievance meeting. During this meeting, Gloe informed Larry Smith:

> that [Respondent] felt that I had been consistent in what I expressed being misled and he also expressed that they felt that they had believed my consistency about what I had said and that I was going to be reinstated. And instead of a termination, it would be reduced to a suspension.

Quinn testified he decided to reinstate Larry Smith because:

> [I]n Larry Smith's case, Larry again said, hey, I never read the grievance, what happened is I was approached by Dan Kane. And Dan Kane misrepresented what was the content of the letter, of the grievance. And by saying that he said, hey, we got problems at the metal detector gate, we want to fix those problems. Larry, did you know that a girl had to lift her blouse up. How could you let a sister go through that kind of abuse. You know. You need to sign this. We can't let that go on, we can't allow that to happen.
>
> And Larry's exact words were, hey, he shamed me into it. He shamed me into signing this thing. I was embarrassed if I didn't sign it people around—again, he was up front and truthful right in the beginning. He said I don't have any problems with the metal detector at all, and never did.

Quinn told Gloe ''Smith and McLendon [Incleton] had been reinstated because they admitted to signing something they had not read.'' Respondent also admitted these two grievants had been reinstated because they informed Respondent they did not want to make a claim for money. Respondent did not refer to the patent disparities between Incleton's and Smith's statements during their grievance meetings and in their testimony, including the inducements to sign the grievance and alterations to the grievance after execution, even though they received the grievance from Kane at the same time and were present at the same discussion. This inconsistency supports the conclusion of pretext in Respondent's reasons for the terminations.

9. Incleton

Incleton works for Respondent as a car shifter. He also was terminated from Respondent's employ for filing the grievance but like Larry Smith, was reinstated. Incleton did not personally have any problems with the metal detector in the fall of 1990; he did not have to take off a ring, had no problems with boots or shoes, and he did not have to lift his shirt.

Incleton signed the grievance because:

> I had been having problems at the guard shack with the security officers that were there. They had been rather aggressive, and they had been harassing my wife in the parking lot, and that was irritating me. And Dan Kane had told us that this would take care of those problems. That's the reason I signed it.

According to Incleton, the guards ''were being very aggressive and offensive.'' He never specifically described the guards' transgressions. Incleton did hear some of the guards had been terminated. Respondent failed to adduce any evidence concerning if any guards were terminated for misconduct and if so, the nature of their misconduct. Respondent did not refute or clarify Incleton's testimony on this point.

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[41] Subsequently, Larry Smith testified he informed Respondent he did not want to file a grievance asking for money, and someone, he could not recall who, asked if he wanted to withdraw the grievance and he said yes. Larry Smith first testified he did not caucus with Arnold, later he admitted to meeting with Arnold who informed him it was an ''ugly situation.'' Larry Smith did not recall much of the conversation. This inconsistent and shifting testimony is further reason to find Larry Smith is not a credible witness.

[42] Inasmuch as Larry Smith executed his grievance from the same day as the other grievants, and their forms were all the same, I find Larry Smith's claim that his grievance was filled in only to ''wedding ring'' and all the remainder was added at a later date patently unbelievable. His testimony appeared self-serving, exaggerated, and untruthful.

Respondent did not deny one or more guards mistreated Incleton's wife. The fact Respondent accepted the claim the guards acted unprofessionally with Incleton's wife raises the question of why they failed to believe the other grievants' assertions that the guards acted unprofessionally with other employees exiting the premises.

When he had his metal detector grievance meeting, Quinn went through the grievance with him line by line. Incleton was discharged the following day and during his discharge he indicated he felt ''misrepresented. Well, I didn't understand. I have to say I was naive. I didn't understand what a grievance was. I didn't understand we were asking for money. I really didn't understand the nature of the proceeding and all.'' Incleton admitted feeling hostility towards Kane because of the trouble engendered by Kane's solicitation of the grievance.

Incleton admitted he had experienced delays at the metal detector. According to Incleton the guards ''were just extremely rude, and they made things as difficult as possible out there.'' He also testified:

> Q. Okay. You also said they made things difficult out there. What were they making difficult out there? Were they making it difficult to leave the facility, to exit the shack?
>
> A. Yes, they were.
>
> Q. And how were they making any difficulty—difficult? Were they making people go back and forth through that metal detector?
>
> A. Yes, they were. Well, they made you go back through every time the thing beeped, and it beeped a lot.

During the metal detector grievance meeting Arnold spoke privately with Incleton and after this discussion, Incleton withdrew the grievance. After being discharged the following day, he subsequently filed a grievance concerning his discharge and was reinstated by Respondent. During his discharge grievance meeting, Incleton informed Respondent:

> That at the time I signed it, I wasn't aware that each particular item applied directly to the individual signing it. That I really didn't understand the nature of a grievance, and that I was under the impression it was a petition for action, not a demand for compensation.

This statement is strikingly similar to the statements of most of the other grievants. Quinn testified he determined Incleton should be reinstated:

> Because when he went into the meeting he told me that he had a problem with a guard. He didn't have a problem at the guard shack. He didn't have delays. As I recall he said the maximum he ever had to wait was thirty seconds. He said he didn't read the grievance. He didn't know it was for money. And he didn't have a clue what was on there. He just, you know, came in, Dan Kane said hey this is a metal detector grievance. You know, sign it and we'll fix the problems at the gate.
>
> Him having a problem with his wife who came to pick him up at work one night and the guard harassing her, or giving her a hard time, was the substance to him signing that particular grievance. But he admitted it right from the get go.

Quinn's recall was disparate from Incleton's testimony where he admitted there were frequent problems at the guard shack, that the metal detector frequently beeped and the employees were made to go back through every time it beeped. The single important distinguishing feature between Larry Smith and Incleton and the other grievants were their statements during the metal detector and discharge grievance meetings that they were not making any claims for money.

I generally credit Incleton's testimony. He appeared to be attempting to recall the events to the best of his ability and admitted his hostility toward Kane. Another consideration in crediting Incleton's testimony is his status as a current employee of Respondent, who, in testifying against his employer on the question of the delay caused by the metal detector, is not likely to give false evidence considering the risk of economic reprisal raised by this action. Citing *Parkview Acres Convalescent Center*, 255 NLRB 1164 (1981); *Pittsburgh Press Co*., 252 NLRB 500, 501 (1980); *Durango Boot*, 247 NLRB 361, 368 (1980).

Based on the credited testimony, including Incleton's, I conclude the metal detector or whatever device was located at the guard shack, beeped frequently, that the guards ''hassled'' the employees requiring them to go through the device every time it beeped or until they were satisfied the individual exiting met their unexplained criteria, causing frequent delays in the employees' departures.

10. The testimony of Lopez

Respondent called Nick Lopez, a 7-year employee who professes to have informed Kane and Lozano his shift, which was the night shift running from 10 p.m. to 2 a.m., did not have any problems with the metal detector. He also told them he understood why management needed to have the metal detector. The twilight shift was the largest. Lopez never observed employees on the twilight shift exiting work, and he lacked personal knowledge of whether they experienced any problems going through the metal detector. Also, there was no indication the same guards were assigned to both shifts. Respondent did not adduce any records indicating the comparative size of the shifts at the times here pertinent. This failure was not explained.

Lopez testified he had been instructed as a union steward not to solicit grievances. He did not claim he had personnel knowledge Kane and Lozano had been instructed by the Union or Respondent to not solicit grievances at any time. He did not claim he informed them they should not be soliciting grievances. There is no claim Lopez inquired whether employees' complaints led Kane to draft the grievance or whether Kane discussed the matter with a member of Respondent's management. Lopez did not aver that any of the Union's governing documents precluded stewards from soliciting grievances.

Lopez also testified he thought employees could get into trouble by signing the grievance, therefore he went around to the employees on his shift and told them not to sign the grievance. When asked specifically why he thought an employee would get into trouble for signing the grievance, Lopez replied, ''Because it wasn't her grievance. She didn't bring it to me, and she didn't say that she was having a

problem with it.'' When asked if he ever inquired if the employee ever had to take her ring off, Lopez initially did not respond to the question, he tried to tailor his testimony, then after being pressed, admitted he did not.

Demeanor alone warrants the conclusion Lopez was not a credible witness. His mien was not direct and open. He appeared to try to avoid giving responses that he perceived were antithetical to Respondent's interests. Supporting this conclusion is my observation Lopez volunteered information. Another factor impairing his credibility is while he claimed to be a knowledgeable shop steward, he admitted he did not know the bylaws of the Union Local. Neither Respondent nor the Union could point to any written rule proscribing stewards from soliciting grievances. I also note his recall was better during direct examination than on cross-examination. Lopez testified he informed Arnold of the Union about Kane's activities of soliciting the grievance, but he could not recall when.

C. *The Metal Detector*

The time of the installation of the metal detector and the nature of the detector are matters that are in dispute. Respondent claims the metal detector was installed at the facility in late January or early February. Most of the alleged discriminatees claim the unit was installed during the summer of 1990. During the presentation of its case-in-chief, Respondent, for the first time, alleges the unit was not really a metal detector; rather it was a ''FEAR'' unit that went off randomly, at a rate of 10 percent of the time exiting individuals stepped on a footpad. Respondent installed it so it appeared to be a metal detector.

Subsequently, at some unknown time, Respondent purchased and installed in place of the FEAR unit an actual metal detector. Respondent recalls the metal detector being installed in 1991 or 1992, sometime after the terminations involved in this proceeding. Respondent failed to introduce any evidence concerning when the metal detector was purchased. It did have purchase orders for FEAR units and hand-held wands. At the same time Respondent purchased the FEAR units it purchased two or more hand-held wands which would actually detect metal.

According to Respondent, once the FEAR unit beeped, guards were to pull the individual going through the unit to one side and check for metal with the wand. If the wands were not being used, then the guards were to have the individual go through the unit again. According to the alleged discriminatees' uncontroverted testimony, the wands were never used by the guards. Respondent admitted the wands were frequently broken. Thus, I find, if the unit beeped, the individual exiting was required to pass through the unit again, thereby slowing the exiting process.

According to Respondent, the persons exiting the facility were required to remove all metal objects, place them in a container at the exit point prior to going through the unit. If the unit beeped, then the employees were to identify any other metal objects which could be considered the cause of the alarm signal, which in this case was referred to as a beep. Everyone exiting the facility was to pass through the unit. As noted above, no guard testified they operated in this manner.

Leister put Saicoe in charge of the guard shack, including the metal detector and/or FEAR unit. Respondent used an outside guard service and Saicoe instructed them how to operate the unit. Saicoe retained control of the keys to the unit, which he kept in his office in an unlocked drawer. Only two other loss prevention supervisors had access to the office, which was kept locked. Saicoe did not exhibit an extended knowledge concerning the workings of the FEAR unit.[43] For example, he could not tell from the invoice which unit was used at the San Gabriel Hub.

The invoices indicate the same model FEAR unit was purchased by Respondent on December 18, 1989, and March 22, 1990. Although Respondent asserts the unit was installed in late January or early February 1990, there was no documentary evidence indicating which unit was used at the San Gabriel Hub and no evidence Respondent could tell with certainty that the unit used at San Gabriel Hub was the one purchased in December 1989.

The invoices indicated the FEAR unit has an ''infrared relay unit.'' Saicoe did not know what the infrared relay unit was or how it worked in conjunction with the FEAR unit. The infrared relay unit could have beeped when a beam was broken rather than only randomly after individuals stepped on a footpad. The infrared feature of the unit was unexplained. This failure to knowledgeably, completely, and clearly describe the actual operation of the unit strongly detracts from Respondent's claim it could not have repeatedly beeped when individuals were exiting the premises through the guard shack.

Further confusing the date of installation is Respondent's claim it used two hand-held wands with the FEAR unit. Only one hand-held wand was purchased with the acquisition of the FEAR unit in December 1989 while two hand-held metal detectors were purchased with the FEAR units according to the invoice dated March 22, 1990.

Saicoe admitted if he chose to have the random selector set higher than 10 percent there was the danger the individuals exiting the facility would have been delayed. Saicoe conceded when Respondent commenced using the unit there were some delays, but Saicoe claims after the first few days ''it seemed to go pretty smoothly.'' He acknowledged he altered the frequency with which the FEAR unit randomly beeped, testifying ''Well, at peak season I cut the percentage down.'' Saicoe defined peak season as the beginning of October to about January 1.

Although Saicoe claimed he was the only individual with the key to alter the settings of the FEAR unit, he did not know if there was an infrared relay that may have caused the unit to beep under different circumstances. He also did not know if the guards chose to unplug the unit whether that caused a beep and he did not represent the unit could not be altered without a key by resort to such devices as a paper clip. Moreover, the record is further clouded by Saicoe's inconsistent testimony concerning who had keys to the unit. After initially testifying he kept the keys in a locked office, he later testified:

> Q. Did the guards have a key, if you'll look at Exhibit R-30, the, it was the representation of the machine. The key on the left you, I'm sorry, the key on

[43] Saicoe testified he was ''somewhat'' familiar with the FEAR unit.

the right is the on/off, did the guards have the key to the on/off selector?

THE WITNESS: I don't believe they did, I don't remember exactly but I don't think they had key to even the on/off switch.

JUDGE WIEDER: Are you sure?

THE WITNESS: I'm not sure, no, ma'am.

Respondent admitted some of the guards stationed at the unit had engaged in harassment of employees and it is currently using a different guard service. The guard service was to train the guards, so Saicoe was not aware of the guard service's instructions to the guards regarding their treatment of employees going through the unit or even their operation of the unit. Respondent did not directly supervise the guards and did not receive reports from the contractor concerning any misconduct by the guards. No representative of the Guard Service appeared and testified. Their absence was unexplained.

According to Respondent, the guards were not informed the unit was merely a random beeper, not a metal detector, and were instructed to ask employees ''to identify any metal items that may cause detection such as steel-toed boots, heavy metal belts and buckles, etc.'' However, Respondent did not claim to know whether the guards figured from the nature of the operation the unit was not really a metal detector. The guards could have determined by the manner in which the unit operated that it was not a metal detector, if such was the case. Respondent did not keep a log of how frequently individuals were stopped by the unit or how many times they were subjected to the hand-held wand. Respondent never asked the guards if individuals leaving the facility had to go through the unit two or more times before they could exit.

Saicoe was also unsure when Respondent installed the actual metal detector, while he opined it was not installed until 1991 or 1992. I find Saicoe was not a credible witness based on his demeanor, which was not open and honest. While demeanor alone warrants this conclusion, I also note he engaged in surmise, was not responsive to some questions, particularly on cross-examination, and he admitted he may have left the San Gabriel Hub in or around October 1990. While Respondent had the personnel record to demonstrate when Saicoe was transferred, it did not adduce this evidence. Based on these considerations, I have credited Saicoe only when his testimony was an admission against Respondent's interests or was credibly corroborated.

Respondent attempted to support Saicoe's testimony with the testimony of his superior Leister, who claimed the FEAR unit installed at the San Gabriel Hub was the one purchased in December 1989. Leister avers the unit was installed about 1 or 2 months after receipt. Contrary to Saicoe, Leister claims he instructed Saicoe what the settings should be on the unit and that was 10 percent. Leister did not address Saicoe's testimony he altered the settings depending on the number of employees Respondent had working at the facility. Leister did not work at the San Gabriel Hub and did not observe the employees departing work daily; he estimated he was at the site, on average, once a week. The time of his visits was not provided, thus there is no basis to conclude he was familiar with the ease or difficulty of departure for twilight-shift employees occasioned by the unit.

I find Leister was not credible, he had occasional lapses in recall and appeared to be tailoring his testimony to please Respondent rather than manifesting a candid mien and manner. He did not appear open and forthright; therefore his testimony will be credited only when it is credibly corroborated or an admission against Respondent's interests. This conclusion is supported by the disparity between his and Saicoe's testimony. Saicoe knew the device could be set to cause undue delay and that it had on occasion caused such a problem. Leister's assertion that delays could not be the result of using the unit, in light of Saicoe's admission against interest, supports my conclusion Leister tailored his testimony and is not credible.

Further confusing the issue of the nature of the unit installed at the San Gabriel Hub in 1990 was the declaration of Quinn which accompanied Respondent's Motion for Summary Judgment. The declaration was executed April 4, 1991, ''under penalty of perjury that the foregoing facts are true and correct.'' Quinn acknowledged knowing the purpose of his declaration was to accompany a Motion for Summary Judgment. Paragraph 17 of this declaration states:

> In more than one case, I disbelieved the grievants' claims that metal eyelets in their shoes were setting the detector off because I asked Denny Leister, the District Loss Prevention Manager, if the machine was this sensitive, and he told me it was not. Moreover, he told me that no complaints had been made to that effect.

Respondent admitted that this declaration indicated the unit was a metal detector that was not so sensitive it would be set off by metal eyelet.[44] Nowhere did this document indicate Respondent was claiming there was a random selection FEAR unit that did not detect any metal. Respondent explained they engaged in this misdirection and hyperbole to protect the integrity of the security system. I find this to be a calculated deception that destroys Quinn's credibility and casts serious doubts on Respondent's case. Quinn was not a credible witness based on demeanor alone. Quinn did not appear candid and unequivocal. He exhibited a certain glibness and engaged in occasional self-serving generalizations or incompleteness in his responses which further weakened his credibility. Accordingly, his testimony will be credited only where convincingly corroborated or contrary to Respondent's interests.

Considering Respondent was able to find the invoices for the FEAR units it purchased and did not submit a legible invoice[45] for the metal detector that admittedly replaced the

[44] Quinn testified Leister informed him on November 19, the day before the grievance meetings, that the unit was not a metal detector; rather it was a FEAR unit that used random selection as the method of discouraging employees from theft. Thus, Quinn knew well before the preparation of his declaration, if his testimony is to be believed, that the unit was not a metal detector rather than a metal detector not so sensitive it could detect metal eyelets on footwear. Of course, another explanation is that the unit was actually a metal detector and Quinn's, Leister's, and Saicoe's testimony were prevarications.

[45] Near the end of the hearing, Respondent proffered an illegible document, representing it was the invoice for the real metal detector installed at the facility. Since the illegible document was not probative, it was not made a part of the record. Respondent did not adequately explain why it had not produced a legible copy of the in-

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FEAR unit, a document clearly within its control, I conclude Respondent did not establish by credible evidence the unit used in the fall of 1990 was the FEAR unit and not a metal detector.[46] Further adding to the confusion of how the unit operated, Saicoe testified:

> Well, the general rule was that, of course, we didn't want our people disrobing, but once they identified the source that we had felt might have triggered the alarm, at that point they didn't search any further, we didn't ask them to remove jewelry or take their shoes or their coats, their belts off, [if] that's what your asking.

This testimony clearly indicates metal triggered the alarm at the times here pertinent.

Marmolejo, like the other alleged discriminatees and Incleton, testified there were days when the unit beeped more than once when they went through. Respondent claims this is not possible for it was a FEAR unit. The way the guards operated the unit was not clearly described on the record. It was not clear whether the guard could and did step on the foot pressure pad so the unit would make a noise as an employee was passing though. Also, Saicoe did not know if the unit would beep if a guard loosened one of the plugs on the unit as an employee exited.

Assuming, arguendo, the FEAR unit was in operation at the San Gabriel hub in the fall of 1990, I find the manner of its operation was not clearly established to preclude the guards from making employees go through the unit more than once when they were exiting. In fact, Respondent's own witnesses, including Incleton and Slater, both admitted they had to go through the unit again once it beeped. Thus, if the unit was a FEAR unit, there was no clear showing it was not and/or could not be operated in a manner that would cause employees to have to go through the unit more than one time on occasions, causing delays of the nature claimed in the grievance.

I conclude, based on the credited evidence, that the unit could and did cause employees' departures to be delayed on occasion, at times frequently. The only question is the average extent of the delay the employees suffered.

Analysis and Conclusions

Section 7 of the Act expressly protects the right ''to engage in . . . concerted activities for the purpose of collective bargaining.'' The filing of a grievance is protected concerted activity as defined in Section 7 of the Act. *Ladies Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975). Respondent clearly stated on the discharge forms of the grievants' material contained in the grievance led to their terminations but argues the grievants lost their protected status when they filed what it calls a false grievance that tried to defraud the Company by asking for ''time lost'' pay for all employees. It is undisputed Respondent made this determination without any investigation and without any firsthand evidence of wrongdoing. Respondent also asserts Kane solicited the grievances for personal motives unrelated to the merits of the grievance. Respondent does not address the grievances request for relief by relocating the timeclock.

For the previously stated reasons, I find Respondent knew the grievants filed the same grievance; albeit there were some attempts to customize grievances after they were signed, these alterations did not unquestionably alter the nature of the situation; a group of employees were complaining about the metal detector. Respondent knew the grievance was not an individual litany of complaints made in a vacuum. It was placed on notice that some employees felt they were being unduly detained at the metal detector which they felt was being used by the guards as a means of harassing them and unduly delaying their departure after they clocked out. ''[T]he advancement of a collective grievance is protected activity, even if the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure.'' *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976), citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. Wall Mfg. Co.*, 321 F.2d 753 (D.C. Cir. 1963); *NLRB v. Hoover Design Corp.*, 402 F.2d 987 (6th Cir. 1968).

The grievance procedures are expressly provided in the collective-bargaining agreement to resolve disagreements and provide a stable collective-bargaining relationship. It is without question the grievance related to terms and conditions of employment, including wages. Further, the Board has long determined the term ''grievance,'' as used in Section 9(a) of the Act, is not limited to formal complaints filed pursuant to an established grievance-arbitration procedure.

The term ''grievance,'' as used in Section 9(a), refers ''to both disputes over interpretation and application of a collective-bargaining agreement and those matters delimited in Section 9(a) of the Act: rates of pay, wages, hours of employment, or other conditions of employment.'' *Top Mfg.*, 249 NLRB 424 (1980). In this case, Respondent claims the grievants failed to follow the requirement that as a first step they discuss the problem with their ''immediate supervisor or manager.'' I have previously found Kane did discuss the employees' problems with the metal detector with Mel Smith. However, assuming Kane's discussion with Mel Smith and reference to Gloe of a grievance did not meet the requirements of the collective-bargaining agreement, the grievances filed by the alleged discriminatees do meet the statutory definition of a grievance. All the grievants clearly claimed they were experiencing some problems at the metal detector. They all clearly indicated they were following a contractually prescribed procedure when they made their complaints on a form boldly entitled grievance. Cf. *First Western Building Services*, 309 NLRB 591 (1992).

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voice with supporting testimony establishing when the metal detector was installed at the San Gabriel Hub.

[46] According to Respondent's witnesses, including Quinn, the unit was sufficiently realistic as a metal detector that he did not know until the day before the grievance meetings that the unit was a random selector rather than a metal detector. Yet, according to Quinn, it never beeped when he exited, and he did not observe others being delayed by the unit. The time Quinn left, his dress and other factors pertinent to his assessment of the operation of the unit as not problematical were not clearly established on the record. If he left when many of the twilight-shift employees were also leaving, and he noted time after time no beeps, or he was never delayed, this fact may have raised a question concerning the operation of the unit as a metal detector. Quinn also failed to claim he saw the hand-held wands in use. Thus he knew, or should have known, the employees who had the unit beep them would have to go through the unit again, delaying their departure and the departure of those in line behind them.

Kane admitted soliciting some of the grievants. As held in *Universal City Studios*, 253 NLRB 1013 (1981): ''It is axiomatic that soliciting grievances, filing of a grievance, and contacting the Union about working conditions, are each protected concerted activities,'' and firing or refusing to rehire individuals for engaging in such conduct violates Section 8(a)(1) of the Act.'' The collective-bargaining agreement does not preclude stewards from soliciting grievances. See also *Russ Togs, Inc*., 253 NLRB 767 (1980); *Ad Art, Inc*., 238 NLRB 1124 (1978); *Thor Power Tool Co*., 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Key Food Stores*, 286 NLRB 1056 (1987).

Under *Wright-Line*, 251 NLRB 1083 (1980), I find by Quinn's admission, Kane's soliciting grievances was a motivating factor in his determination to discharge Kane and not rehire him establishes a violation of the Act. Respondent admits the Union did not knowledgeably waive this right in the collective-bargaining agreement. This establishes a prima facie showing that his protected activities were a motivating factor in the decision to terminate him and classify him as ineligible for rehire.[47] Respondent, therefore, bears the burden of demonstrating by a preponderance of the evidence it would have taken the same action in the absence of Kane's protected activity. *George A. Tomasso Construction Corp*., 316 NLRB 738 (1995), quoting *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278 (1977).

Similarly, the filing of the grievances asking for monetary relief as part of the resolution by the other alleged discriminatees was a motivating factor in Respondent's determination to discharge them and not rehire them. Respondent admitted the claim for money was the litmus test for its decision to discharge and refuse to rehire the alleged discriminatees. Respondent never argued it was contrary to the collective-bargaining agreement or another valid rule to ask for money in a grievance which asks for redress for the entire employment compliment. Here too, I find the General Counsel has made a prima facie showing that the filing of the grievances were motivating factors in the conclusion to discharge and not rehire these grievants. Respondent bears the burden of demonstrating these grievants lost the protection of the Act because of the content of the grievance.

It is undisputed the grievants all conducted themselves reasonably at the grievance meetings, and the content of the grievance became the cause of their terminations. They did not use foul language or engage in other obviously opprobrious conduct. None were belligerent or insubordinate. Respondent avers it did not believe those employees it discharged, and only those two reinstated, those who disclaimed any request for lost time pay, were believable and thus reemployable. The statutory protection afforded grievants finds legitimate grievances that ''are couched in imprecise or improper language . . . . a steward is protected by the Act while fulfilling his role in processing a grievance, even if he exceeds the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure.'' *Clara Barton Terrace Convalescent Center*, supra. See, e.g., *Crown Central Petroleum Corp*., 177 NLRB 322 (1969), enfd. 430 F.2d 724 (1970); *Bettcher Mfg. Corp*., 76 NLRB 526 (1948); *Hawaiian Hauling Service*, 545 F.2d 674 (9th Cir. 1976).

All the alleged discriminatees claimed at least one of the problems recounted in the grievance happened to them. Only Smith said he had no problem at the metal detector. For the reasons previously stated, his testimony is not credited. Respondent did reinstate Incleton, who represented to Respondent during the grievance meeting and during his testimony that he had experienced some problems and had his departure from work delayed because of the metal detector, even though his main concern was the harassment of his wife by these same guards. Why Respondent believed the guards harassed Incleton's wife but did not believe they harassed and delayed the alleged discriminatees is unexplained.

As counsel for the General Counsel correctly argues, the Board has long held to the doctrine ''that an employee's honest and reasonable invocation of collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated.'' *Interboro Contractors*, 157 NLRB 1295 (1966). See also *First Western Bldg. Services*, 309 NLRB 591 (1992); *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

Respondent admitted it discharged all the grievants who maintained they were entitled to pay for the time they were delayed at the guard gate. I find to be without merit in this case Respondent's argument this aspect of personal benefit is significant in removing their conduct from the protections of the Act, citing *Roadmaster Corp*., 288 NLRB 1195 (1988), affd. 874 F.2d 448 (7th Cir. 1989).[48] Based on the credited evidence, I find the grievants held honest and reasonable beliefs they were entitled to exit Respondent's premises free from the described problems and with pay for the delay's occasioned by the device and the guards' behaviors. Mel Smith did not inform Kane his claim was without merit, only that Respondent would not be willing to adjust his grievance.

While Respondent asserts the grievances were lies, it presented no studies of employees leaving at the time the alleged discriminatees claimed there was a problem; they did not investigate any of the claims. Significantly, Respondent did not notify the grievants that in its view their entire claim lacked merit, only that certain portions did not pertain to them. When Kane was informed his claim lacked documentation, he readily agreed to withdraw it pending the accumulation of such documentation. This offer reflects Kane honestly and reasonably invoked his collective-bargaining rights.

Respondent also argues the requesting of pay for time lost and Kane's and Lozano's union campaigns for delegate inserted personal gain as their motive for filing false grievances. The grievance was filed to correct what these employees perceived as a work problem which would be subjected to the grievance procedure through which such problems were resolved. There was no demonstration of an intent to

[47] There was no claim Respondent maintained an unlawful no-solicitation rule. Thus, my consideration of Respondent's rule is limited to the issue of whether its application to Kane's activities was over broad and constituted an unfair labor practice in violation of the Act.

[48] As is the case here, in *Roadmaster*, the Respondent considered a grievance on a union letterhead as a company document and the Board held such a document ''cannot reasonable be considered company documents within the meaning of Respondent's rule in this case.'' Id. at 1196. In both *Roadmaster* and this case, the Employer never informed the Union prior to the discharges that the grievances became company documents once filed.

deceive, rather a misunderstanding as to the purport of the grievance, whether an individual or group grievance. As soon as the grievants were asked which assertions in the grievance pertained to them, they readily admitted which events they experienced, which they observed, and which they did not. Thus, I conclude there was no demonstration of an intent to deceive by these seven grievants.

Although Respondent avers the seven employees intended to deceive by claiming at trial they were subjected to repeated beeps, it failed to demonstrate clearly and convincingly when the metal detector was installed and how the FEAR unit was operated. There was no credible support of its bare claim of deliberate falsification. Moreover, the repeated beeping was not raised in the grievance, it was inserted into the proceeding by Respondent.[49] Respondent had the documentation when the actual metal detector was installed yet did not produce this record, rather it produced the older record for the purchase of the FEAR unit. The only clear demonstration of intent to deceive was Quinn's declaration to the Board that claimed the metal detector was not sufficiently sensitive to cause the employees to be halted for having metal eyelets in their boots. Of course, Quinn's statement may not have been a deception, a metal detector may have been installed at the times here pertinent and then, Quinn's testimony would be the attempt to deceive. In either event, Respondent has failed to support its claim.

Respondent presented no documentation or study to dispute the claim there were delays at the guard shack or that such delays were less than 3 minutes. Two of Respondent's witnesses, Saicoe and Leister, whom I have found were not convincing, claimed there were no delays, to their knowledge. Saicoe did observe twilight-shift employees leaving. There was no evidence when he made these observations or at what time. This bare assertion by this witness is not convincing. Respondent had the time and opportunity to observe the shift employees' departures prior to the grievance meeting and failed to do so. Saicoe was not consulted by Quinn or anyone else shown to have participated in the decision to discharge these employees. As previously noted, Saicoe did have to alter the settings on the FEAR unit to avoid delays. He did not expressly claim he was successful and/or timely in all instances. Thus, there was an admission against interest the FEAR unit could and would cause delays.

Nor had Respondent presented convincing evidence that the guards' conduct at the gate during the time here in issue was such as to ensure the speedy departure of the employees, without any delays occasioned by the use of the unit or any proclivity toward harassment. The failure to investigate the merits of the claims prior to the discharges and deeming the alleged discriminatees unfit for reemployment without any investigation is such a complete failure of proof as to require the conclusion it did not believe these employees had filed false claims.

All Respondent asserted was the day before the grievance meetings Quinn learned the unit was not a metal detector. There was no assertion he also learned there was no possibility of delay or that the conduct of the guards was without reproach. To the contrary, Respondent accepted Incleton's claim the conduct of the guards included harassment of his wife. Respondent was not pressed for time, for the grievance was filed on or about October 22 and the grievance meetings were not held until November 20; a more than adequate time to test the accuracy of the grievance. It is not unreasonable for Respondent to believe that the increases in staffing to meet business needs would have resulted in increasing delays at the guard shack. In fact, Respondent failed to convincingly establish which unit was installed at the pertinent times. I conclude this reason, the FEAR unit, to be pretextual, and the reason for their terminations was the unlawful reason imputed to it by General Counsel. *Shattuck Denn Mining Co. v. NLRB*, supra; *Southwest Merchandising Corp. v. NLRB*, supra.

Assuming Respondent's belief the employees broke the honesty code in their grievance was a good-faith belief, then Incleton and Smith, logically, would not have been reinstated for they also signed the grievance. Smith's claim he had not read the grievance may have been exculpating for him, but Incleton admitted he experienced delays at the metal detector and they both signed the grievance that they readily acknowledged contained misstatements. Smith's claim that he did not understand the nature of the grievance is no different than the other grievants stating they understood it was a ''general'' nee ''group'' or ''et al'' grievance. As already noted, the only distinguishing feature is Incleton and Smith informed Quinn they were not making a claim for money.

Thus, the waiver of a contractual remedy, redress through the grievance processes, rather than the honesty policy appears to be the litmus test for reinstatement, and the credible evidence establishes Respondent's claim it was merely enforcing the honesty policy is pretext. Reinforcing this conclusion is Respondent's admission that the only individuals it reinstated were the two who were willing to waive any claim to lost time pay, a potential remedy to their complaint under the collective-bargaining agreement. Additional support comes from Gloe's statement during the Marmolejo discharge that Marmolejo should ''watch out who my friends are'' and his friends ''got me into this trouble.''

Respondent argues the crossing out of certain portions of the grievance for particular individuals demonstrates the grievants understood it was not a ''group'' grievance. Initially, this argument overlooks the fact that it is undisputed, the editing was done by Kane, sometimes in consultation with the grievant after they already signed the grievance. It is also unrefuted Kane asked all the grievants to only sign if the grievance pertained to them. There was no explanation or requirement that all incidents mentioned in the grievance had to actually happen to each grievant. Again, at the most, the record supports a conclusion the grievants, including Kane, were confused and unsophisticated about the grievance procedure, as it acknowledged in the cases of Larry Smith and Incleton.

Respondent argues all the twilight-shift employees did not leave work at the same time, thereby making delays less likely. However, Respondent failed to adduce any credible evidence concerning the number of employees leaving at particular times. Again, Incleton, a current employee, admitted he was delayed at the unit at times. As previously noted, as

[49] As previously noted, assuming the FEAR unit was in use during the times here pertinent, the guards may have determined a method to cause the beeps as a means of harassing the employees. Respondent believed Incleton that the guards were harassing his wife, so it is not beyond Respondent's belief the guards may also have harassed other departing employees. Further, there is no cause to disbelieve Incleton.

a current employee reinstated after filing the grievance, it is unlikely he would fabricate testimony adverse to Respondent's interests. *Steelcase, Inc*., 316 NLRB 1140 (1995); *Rodeway Inn of Las Vegas*, 252 NLRB 344, 346 (1980).

To treat grievances as violations of the Company's ''honesty policy'' also improperly attacks the protected status of these grievances for it would require grievants to have tested the propriety of all their claims and assertions prior to filing a grievance or be subject to immediate discharge. Such a requirement threatens to divest Respondent's employees of their right under the collective-bargaining agreement to file grievances. The grievance process itself is the mechanism that tests the reasonableness of the complaints. Even if the employees held mistaken beliefs, they had a reasonable basis for these beliefs. *G. W. Truck*, 240 NLRB 333 (1979).[50]

If his testimony is credited, Quinn also believed, until informed by Leister shortly before the grievance meetings, that the unit was a metal detector. Assuming the device was not a metal detector, it was operated in a manner similar to metal detector, at least sufficient to convince Quinn and Gloe. As held in *G. W. Truck*, id:

> The fact that Detrich, in relying upon the terms of the August 23 agreement, misinterpreted the agreement is not relevant to the issue of whether he engaged in protected concerted activities, for the protection of the Act is not dependent upon a correct interpretation of a collective-bargaining agreement or on the merit or lack of merit of the concerted activities. See *NLRB v. H.C. Smith Construction Co*., 439 F.2d 1064 (9th Cir. 1971); *Anaconda Aluminum Co*., 160 NLRB 35, 40 (1966); *Mushroom Transportation Co.*, 142 NLRB 1150, 1157–1158 (1963).

After having found the claimant acted ''in good faith with a reasonable belief'' Administrative Law Judge Shapiro concluded, in view of this finding, ''it is immaterial that, in discharging [the employee], the [Employer] may have thought that when [the employee] filed his insurance claim he had acted dishonestly or in bad faith.'' *G. W. Truck*, supra at 341.

Accordingly, even if it is found Respondent held an honest belief in the truth of its claim the employees lied, this belief is not a defense to a finding its actions were violative of Section 8(a)(1) of the Act. I find the credited evidence establishes the employees acted ''in good faith with a reasonable belief.'' Accordingly, I find Respondent violated Section 8(a)(1) of the Act by discharging the alleged discriminatees and refusing to reinstate them because they filed the grievance. See *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21 (1964); *American Shuffleboard Co*., 92 NLRB 1272, 1274–1275 (1951).

I find unpersuasive Respondent's claim Kane's and Lozano's motivations were improper which removed them from the protections of the Act. This allegation was unsupported by the evidence and fails to address the motives of the other five alleged discriminatees. The credited evidence demonstrates several employees complained to Kane about problems they were experiencing at the metal detector. Kane listed those problems he personally encountered and advised those he solicited to sign only if the ''grievance pertained to them.''

Kane's and Lozano's activities were not demonstrated to have been generated by improper motives or a hidden agenda of any type, no less of such a character as to render their interpretation of the contract unreasonable or made with malice or in bad faith. At the time the grievance was filed, Kane had decided to run for the position of delegate. There was no evidence concerning how many delegates were to be elected or how many individuals were also seeking the position. There was no evidence there was a need or desire for help in getting elected by resort to the grievance process.

Lozano was merely considering running for delegate at the time. Kane and Lozano were not shown to be seeking higher union office or to be in jeopardy of losing their positions as shop stewards. At the time Respondent determined to terminate them, it had no inkling they were running for delegate or to suspect such a motive.[51] I conclude the motivation of Kane and Lozano has not been shown to be improper or to otherwise cause them to lose the protection of the Act. Buttressing this conclusion is the failure of Respondent to call any witness to describe the delegate position or to knowledgeably discuss what, if any, special union related benefits Kane and Lozano would derive from their pursuit of the grievance.

That Respondent informed the dischargees they were terminated for theft, even though all had withdrawn their grievances; another example of hyperbole which, at the least, is another indication of proscribed motive. Respondent gave no credible and reasonable basis to refute the grievants' claim they thought they were entitled to the remedy they sought in the grievance under the terms of the collective-bargaining agreement during the grievance meeting. This failure was also unexplained.

Other factors supporting this conclusion of proscribed motive is Respondent usually investigated grievances and it usually informed the steward before the grievance meeting there would be such a meeting. Respondent failed to follow these procedures in this case, the stewards, Kane and Lozano, were not informed prior to the meetings, and Respondent, by Quinn, did no more than have a short conversation with Leister. Respondent had no proof the grievances contained knowledgeable dissembling or otherwise contained such improprieties as to warrant their discharges. *NLRB v. Thor Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965). The grievance remained a shield protecting the employees, and was not used as a sword by Kane and Lozano to gain immunity to conceal a motive of harassment or to enhance their chances for election to the position of union delegate. *Rocket Messenger Service*, 167 NLRB 252 (1967); *Charles Meyers & Co*., 190 NLRB 448 (1971); *Ad Art, Inc*., 238 NLRB 1124

[50] As the Court held in *NLRB v. Burnup & Sims, Inc*., supra: ''A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the Section 8(a)(1) right that is controlling.''

[51] Respondent also argues Kane's bypassing the first step is indicative of improper motive. As found above, I credit Kane's unrefuted testimony he spoke to Mel Smith and believed that he fulfilled the collective-bargaining agreement requirements for a first step. Respondent treated the filings as grievances, and never disputed this status. Thus I find Kane's method of presenting the grievance was not an indication he was attempting to harass the Respondent or had any other improper motive.

(1978). The other five alleged discriminatees were not shown to have any improper motives of the nature that would cause them to lose their protection of the Act.

I conclude there has been no showing the alleged discriminatees' conduct was so flagrant, that they lost the protection of the Act or was so abusive and inflammatory as to warrant their terminations. There was no threat to Respondent's right to maintain order and respect. *Dreis & Krump Mfg. Co*., 544 F.2d 320 (7th Cir. 1976). The grievance was not shown to have contained such misrepresentations or unreasonable allegations as to render the employees unfit for further service. See *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946), which held at 816, that communications occurring during the course of otherwise protected activity remain likewise protected unless found to be ''so violent or of such serious character as to render the employee unfit for further service.''[52] This record fails to demonstrate the claims of the employees in what they thought to be a general grievance are other than genuine and reasonable.

Respondent argues the striking out of certain claims from some of the grievances demonstrates they were filing individual grievances. Yet Respondent admits it immediately recognized the employees filed a duplicated grievance which requested a remedy for all employees. Respondent failed to indicate with specificity what the grievants had to do to file a ''group'' or ''et al'' grievance. Its failure to distinguish the current grievances from the ''group'' or ''et al'' grievance further weakens it argument that it considered the grievants to be violating the honesty policy by including claims in their grievances that did not apply to them.

Throughout this record, Respondent claimed it recognized a ''group grievance'' or ''et al'' grievance. Unexplained is why the Company acknowledged the grievants filed the same grievance but failed to treat it as a group grievance.[53] Respondent indicated it would not have required all problems to have been experienced by all grievants if they had filed a ''group grievance.'' One or more of the grievants, when asked during their grievance meeting, informed Respondent he considered it a general grievance, one where all the problems did not have to individually apply to him. Other grievants told Quinn they considered the filing to be in the nature of a petition. Although some grievances were altered after execution, there was no showing such alteration was done with full realization that all the remaining problems raised had to personally apply to them. The relief sought in all the grievances was time lost pay for all employees and moving the timeclocks to the guard shack, not just the lost time pay for the grievants. The requested relief indicated the grievants were treating the procedure as a petition or ''group'' or ''et al'' grievance.

Also weakening Respondent's claim these employees were terminated for dishonesty is its failure to distinguish the treatment of Kane, who asserted all the problems mentioned in the grievance applied to him, and the other grievants who admitted one or more of the problems did not apply to them. If Respondent did not believe Kane, then why did Quinn or Gloe not so inform him during the meeting.

There is no claim any of the grievants filed other grievances or were using the grievance procedure as a sword. It is not contended any of the grievants was a habitual nuisance. I conclude Respondent has failed to meet its burden of proving any of the grievants have ''so abused his right to file grievances as to have engaged in unwarranted harassment of Respondent.'' *Ad Art, Inc*., supra. In *Ad Art*, the employee was found to have retained the protection of Section 7 of the Act even though he had filed two dubious claims for pay in grievances and had filed multiple grievances.

I find Respondent has failed to demonstrate the claims of the grievants were so dubious as to warrant finding they lost the protection of Section 7 of the Act. That several grievants signed claims that did not specifically apply to them is not sufficient to proclaim harassment or other grounds for loss of protection of the Act. Where, as here, the employees thought they were signing a general complaint, their motives were manifestly to use the collective-bargaining agreement to protect what they perceived to be their bargained for terms and conditions of employment. To hold otherwise could still be enforcement of the collective-bargaining agreement through the use of the grievance procedure by causing employees and stewards to FEAR any inadvertent misstatement or misunderstanding could lead to discharge. Respondent ''measured [the Grievants'] conduct against a standard which conflicts with Board law.'' *Union Fork & Hoe Co*., 241 NLRB 907 (1979).

As noted in *Interior Alterations, Inc. v. NLRB*, 738 F.2d 373 (10th Cir. 1984): ''The protection of the Act is not dependent on the merits of the underlying complaint.'' Considering the credited testimony, I find the complaints contained in the grievance were reasonable and founded on legitimate concerns. As noted previously, I further find the complaints were not fabricated, posited in bad faith or for improper personal motives. This finding is buttressed by the fact that as soon as Respondent questioned the grievants' personal motives or hinted fabrication, they all withdrew their grievance without reservation. That these employees were under the belief they filed a general grievance does not render their actions unprotected. *Prescott Industrial Products Co*., 205 NLRB 51, 52 (1973).

Respondent indicated its experience with Kane and Lozano demonstrated they were very thorough and had very good documentation in other grievances they handled. Kane had only handled two other grievances while he was a steward. It appears Respondent was incorrectly holding Kane and Lozano to a higher standard of conduct than other grievants. Id. It appears the claim for time lost pay caused by the delays at the metal detector was the key determinant between which grievants were reinstated and which were not. Respondent failed to explain why it asked each grievant for

[52] See further *Grinnell Fire Protection Systems*, 307 NLRB 1452, 1454 (1992), where it was determined ''actions by an Employer, regardless of the subjective motives, was clearly coercive in nature in that it would reasonably tend to inhibit employees from filing grievances under the union contract for FEAR of retaliation by the Respondent . . . and was never timely explained or retracted in a manner which would allay the FEARs of employees or union representatives that employee's jobs may be in jeopardy if they filed grievances against Respondent, whether meritorious or not.'' Citing *St. Regis Paper Co*., 247 NLRB 745, 748 (1980); *Berwick Forge*, 237 NLRB 337, 341 (1978); *Jack Holland & Sons, Inc*., 237 NLRB 263, 265 (1978).

[53] That Arnold testified the Union did not recognize a ''group'' or ''et al'' grievance is not relevant to this finding since Quinn testified the Company would recognize and process such a grievance and would exculpate the employees from having to have all representations in such grievance pertain to them personally.

documentation in support of the claimed pay for delay but failed to accept Kane's offer of withdrawal with a resubmission of the grievance once he documented the amount of the delay occasioned by the device and implicitly, the conduct of the guards.

In conclusion, Respondent violated Section 8(a)(1) of the Act by discharging and refusing to reinstate Daniel Kane, William Marmolejo, Byron McLendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa because they filed a grievance, which interfered with, restrained, and coerced them in the exercise of their right to engage in such activity.[54] Further, I find Respondent has failed to establish by a preponderance of the credible evidence that the seven grievants' conduct was of such a nature as to justify their loss of the protections of the Act. I conclude the discriminatees' conduct did not exceed the bounds of otherwise protected activity and thus lose the protections of the Act or warrant their preclusion from reinstatement.

CONCLUSIONS OF LAW

1. Respondent, United Parcel Service of Ohio, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Package and General Utility Drivers Local 396, International Brotherhood of Teamster, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging and refusing to reinstate Daniel Kane, William Marmolejo, Byron McLendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa because they engaged in the concerted protected activity of filing a grievance, the Respondent violated Section 8(a)(1) of the Act.

4. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully discharged and refused to reinstate Daniel Kane, William Marmolejo, Byron McLendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa in violation of Section 8(a)(1) of the Act, I recommend that Respondent be ordered to offer Daniel Kane, William Marmolejo, Byron McLendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings as a result of their unlawful discharges, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that any reference to the discharges of Daniel Kane, William Marmolejo, Byron McLendon, Alfonso Lozano, Rudy Silva, Nicolas Rivas, and Christopher Villa be expunged from their employment records, and Respondent shall provide these employees with written notice of the removal, and inform them that their unlawful discharge will not be used as a basis for future personnel action.

[Recommended Order omitted from publication.]

[54] Inasmuch as the remedy is the same, I find it unnecessary to determine whether the discharges and refusals to rehire also violated Sec. 8(a)(3) of the Act. *NLRB v. Burnup & Sims, Inc*., supra; *G. W. Wilson*, supra. If the Board deems it necessary to resolve the 8(a)(3) issue, I note I have found persuasive evidence of pretext. Another indication of proscribed motive is Respondent's acceptance of the grievants' withdrawal of their grievances yet determined to discharge them despite this action. I find the withdrawals were in the nature of a settlement of the grievances. If Respondent accepts the withdrawal then acts on the substance of the grievance by discharging the employees, its actions undermines the grievance process and undermines this method of dispute resolution. See generally *Machinists & Aerospace Workers v. Safeguard Powertech Systems*, 623 F.Supp. 608 (D.C.S.D.1985). Respondent's resort to pretext, its failure to inform the employees of all the reasons for their discharge, such as Kane's solicitation of the grievance, and its failure to call top managers who participated in the termination decision, require the conclusion that Respondent's actions were unlawfully motivated. General Counsel has presented a prima facie showing of discriminating conduct. The Respondent has failed to carry its burden of proving by a preponderance of the evidence that it would have taken the same action for legitimate reasons.